No. 90.

Brief of Springer for Appellees.

Filed Nov. 1, 1897.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1897.

No. 90.

GUADALUPE THOMPSON, ET AL.,
Appellants,
vs.
THE MAXWELL LAND GRANT AND RAILWAY COMPANY, ET AL.,
Appellees.

Appeal from the Supreme Court of the Territory of New Mexico.

BRIEF FOR APPELLEES.

FRANK SPRINGER,
Counsel for Appellees.

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Statement.

This is an appeal from a judgment of the Supreme court of the Territory of New Mexico, affirming a decree rendered by the District court for

the Fourth Judicial District of that Territory in favor of complainants and appellees, quieting in them the title to the property in controversy. The property involved is an undivided one-twelfth interest in the Beaubien and Miranda Grant, or Maxwell Grant, as it is now better known.

This suit was begun in 1870, and proceeded to a decree in favor of complainants in 1873. Upon appeal to this court from the judgment of the Territorial Supreme court, affirming it, the decree was reversed, and the cause remanded for further proceedings in conformity with the opinion.

Thompson vs. Maxwell, 95 U. S. 391.

The case has been before the courts of New Mexico ever since, the litigation having been complicated by a number of collateral proceedings, one of them being another suit in the nature of a cross-action, involving the same facts and largely the same questions, which is now also before this court on appeal.

A full history of the litigation, and a statement and discussion at length of the questions involved, will be found in the brief for appellees in that case, *Bent vs. Miranda*, No. 91, on the present term calendar.

As the two cases are to be heard together, it is not deemed necessary to repeat that statement here, especially in view of the fact that the case now under consideration has already been before this court, and the issues are fully stated in the opinion by Mr. Justice Bradley, in 95 U. S. 391.

It is believed that the greater part of the discussion in case No. 91 is unnecessary, and that the controlling question for both cases has been deter-

mined by this court in the decision above mentioned, when taken in connection with the facts as now found by the Supreme court of New Mexico, and certified in the record for the purpose of this appeal.

The decree rendered in 1873, in favor of complainants, was reversed by this court upon a question of pleading. The bill on which it was founded was framed as a bill of review, to reverse and modify a decree entered in September, 1866, vacating a former interlocutory decree, and directing a conveyance of the interests of the Bent heirs to Maxwell, in pursuance of a compromise of the litigation; and it also prayed that the defendants be decreed to have no interest in or title to the premises, equitable or otherwise, and that complainants be decreed to hold the premises free of all trusts, etc.

It was held by this court that the relief sought could not be had upon such a bill as a bill of review, because—

1. It sought to reverse a consent decree.

2. It was filed by an assignee of the original defendant, thus making different parties.

3. It sought to reverse and modify the decree upon matter of fact not apparent on the record.

An inspection of the opinion and the order remanding the case clearly shows that while the decree was reversed for the above reasons, it did not hold adversely to the complainant's case as disclosed by the record; but that on the contrary it held that upon the facts then shown they were entitled to the substantial relief they sought if it were asked by a bill in proper form, pointed out the changes necessary to constitute such a bill, and

remanded the case,—not for dismissal, but for further proceedings, the nature and limits of which were distinctly pointed out;—all with a view to securing to complainants the benefit of the relief to which they were evidently entitled.

The following extracts from the opinion on pages 398, 399 and 400, will show that this statement of the effect and intent of the decision is correct:

"The case, it is true, is somewhat anomalous. The decree sought to be set aside by the bill of review was not made in pursuance of the relief sought by the bill in the original cause, and was not based upon the pleadings and evidence therein. It was a decree for confirming and carrying out a settlement of the controversy, which had produced a change of interest. The original suit was instituted by the heirs of Charles Bent, to establish an equitable interest in an undivided share of the lands, and for a partition thereof. A decree was made establishing the right, ordering the partition, and appointing commissioners to make it. This was as far as the suit progressed. It was then settled, and the decree in question was entered by consent, setting aside the decree for partition, and carrying out the settlement. The bill of review alleges the fact to have been that the settlement was made by Alfred Bent in his lifetime, and that the decree ought not to have set aside the former decree establishing his rights, and ought not to have directed the guardian of his infant heirs to execute a conveyance; but ought to have declared the land discharged from the trust, upon payment by Maxwell of the agreed consideration to Alfred's personal representatives. In other words, the bill of review insists that the decree was misconceived and erroneous, in view of the state of facts out of which it grew, and which did not appear in the record of the cause.

"We do not think that the peculiarity of the

case, however, takes it out of the ordinary rules that apply to a bill of review. *A decree for carrying out a settlement and compromise of a suit is certainly not, of itself, erroneous. When made by consent, it is presumed to be made in view of the existing facts, and that these were in the knowledge of the parties. In the absence of fraud in obtaining it, such a decree cannot be impeached.* (P. 398.) * * *

"Tested, therefore, by any law of procedure which may be invoked in its support, the bill in this case, considered as a bill of review, seeking to reverse, modify, and reconstruct the decree of September, 1866, cannot be sustained. Nevertheless, the general purpose which it evidently had in view—the quieting of the title to the land in question—is one towards which a court of equity is always liberally disposed, as tending to promote the peace of society and the security of property. *And if, instead of seeking to reverse the decree of September, 1866* (which, for like reasons of public policy, as applicable to the security of judgments that have passed into *rem adjudicatam*, is not allowable), *the bill had sought to carry that decree more effectually into execution, it it would have been free from legal objections, and equally conducive to the object in view.*" (P. 399.) * * *

"The decree of September, 1866, has never been carried into effect by any act done since it was made. It directed that Maxwell should pay the money stipulated for by the compromise, and that the defendant should execute deeds of conveyance. But the parties seem to have assumed that their previous acts performed in May, 1866, were a sufficient compliance with the directions of the decree. Yet the decree does not take notice of this fact.

Now, in order to execute this decree, or to determine whether it has or has not been substantially executed, and to determine and declare the effect of such execution upon the rights of all concerned, and thus remove any cloud from the title arising from the imperfection of the proceedings, it was perfectly

competent for the parties to file a bill conceived and constructed to that end. The bill in this case, as originally filed, before it was converted by amendment into a bill of review, and abating the allegations of error in the original decree, approximated to the character of such a bill as might have been sustained. *The proofs show a case which, in our judgment, supports the conclusions of the decree, to the effect that the terms of compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent) were advantageous to the said infants, and were so considered and accepted by the court in their behalf.* But, so far as the present decree undertook to reverse and modify the decree of September, 1866, we think it is clearly erroneous. Still, although we feel obliged to reverse the present decree, *we do not think that the bill should be* absolutely dismissed. *And, as the whole question between the parties has been fully litigated on the proofs*, it would be unreasonable to require that these should be taken over again.

Our conclusion is, that the present decree must be reversed with costs, and that the cause be remanded to the court below, with directions to allow the complainants to amend their bill as they shall be advised, and *with liberty to the defendants to answer any new matter introduced therein;* and that all the proofs in the cause shall stand as proofs upon any future hearing thereof, with liberty to either party to take *additional proofs upon any new matter* that may be put in issue by the amended pleadings; and it is *So ordered.*" (Pp. 400-401.)

In amending the bill after the case was remanded to the Territorial court, complainants followed strictly the intimations of the opinion. Instead of introducing new matter, the amendment was made by eliminating from the former bill all allegations and prayers which made it a bill of review, and leaving it a simple bill to quiet title, of the character

which this court had declared would have been proper. (Rec. pp. 62-70.)

Defendants thereupon filed further answers, setting up an entirely new defense, alleging that the deed of Guadalupe Bent, and the decree of September, 1866, were procured by Maxwell through imposition, deceit, misrepresentation and fraud. (Rec. pp. 70-85.)

Upon exceptions to these answers, the District court struck out the portions alleging the new matters, for the reason that they were not authorized by the decision and mandate of this court, which limited the right of further answer to new matter introduced into the bill. The case then proceeded to a final hearing, and a decree in conformity with the prayer of the bill. This decree was reversed by the Supreme court of New Mexico on the ground of error in sustaining the exceptions to the new answers, and the case was remanded with direction to the lower court to restore the portions of the answers which had been stricken out.

Thompson vs. Maxwell, 3 N. M. (Gild.) 448.

We believe this decision of the Territorial Supreme court to have been erroneous, and in direct conflict with the mandate of this court. There was nothing in these new answers which was not perfectly within the knowledge of Guadalupe Thompson and her husband, and if true might have been set up in their answers to the original bill made ten years before. Nothing can be more certain than that this court did not intend the case to be litigated afresh, but that on the contrary it did intend that the case should proceed to decree upon the proofs as they

stood, unless complainants, in amending their bill, should introduce new matter therein.

Further proofs were then taken upon the amended pleadings as restored pursuant to the mandate of the Territorial Supreme court (Rec. p. 97), and the case proceeded to final decree a third time, declaring that the defendants have no interest in or title to the property in controversy, and decreeing that the same is held by complainant and its assigns free from all trusts, right, title, interest or claim of defendants. (Rec. p. 98.)

This decree was affirmed by the Supreme court of New Mexico.

Maxwell vs. Thompson, 7 N. M. 581 (Rec. pp. 100, 136); and upon appeal from that court is now here a second time for review.

The Territorial court, pursuant to the Act of April 7, 1874 (18 Statutes at Large, 27), has certified as a part of the record a statement of the facts established by the evidence (Rec. pp. 101-133) which is conclusive.

> *San Pedro Co. vs. United States*, 146 U. S. 130.

From this statement the following facts appear:

1. That after the interlocutory decree of June 3, 1865, the Bent heirs, complainants in the suit, entered into negotiations with Maxwell for a compromise of the litigation; that Alfred Bent, acting for himself and his co-complainants by their authority, and upon the advice of one of their counsel, made overtures to Maxwell for a compromise, visiting him at his residence for that purpose; that he demanded $21,000 for a release of the claim of the Bents, and Maxwell offered $18,000; that Alfred returned with-

out having effected a definite agreement with Maxwell as to price; that the Bents considered the sale as good as made, expected to close the bargain in a few days, but Alfred told his co-complainants that they could get a few thousand more by being quiet a few days; that they were ready to make the deeds, and the deeds were already written out by one of them; that before anything further was done, Alfred Bent died in December, 1865. (Rec. p. 118.)

2. That after the death of Alfred Bent negotiations for a compromise were resumed, the Bent heirs being then represented by Scheurich, husband of Teresina, one of the adult complainants, who acted on behalf of his wife, Estefana, and her husband, and Guadalupe Bent; that a settlement was concluded with Maxwell by Scheurich, acting for the adult complainants and Guadalupe Bent as guardian *ad litem* for the children of Alfred Bent, which was acceptable to them, by which Maxwell was to pay $18,000 for the conveyance of the interest or claim of the Bent heirs; that this compromise was advised by Merrill Ashurst, another and the leading counsel for the Bent heirs; that it was accepted and carried out by the adult complainants and their husbands, and Guadalupe Bent, who all executed deeds accordingly. (Rec. pp. 125-6.)

3. That at the April term, 1866, an order was made in the cause, on motion of the solicitors for complainants, by which Guadalupe Bent was appointed guardian *ad litem* for the minor heirs of Alfred Bent, "with full power to execute deeds, or to carry into execution all sales or transfers made of their interest in and to the real estate therein described, to Lucien B. Maxwell" (Rec. p. 125); that

Guadalupe Bent executed her deed to Maxwell in pursuance of said compromise, as such guardian *ad litem*, under and by virtue of said decree and order, which is recited at large in her deed. (Rec. pp. 126-128.)

4. That at the September term, 1866, a decree was entered, setting aside the interlocutory decree by which a one-fourth of the grant had been decreed to complainants, and directing Maxwell to pay complainants $18,000, and directing complainants—naming the adults and their husbands, and Guadalupe Bent as guardian *ad litem* for the three minor children of Alfred Bent—to execute and deliver to Maxwell deeds conveying all their right, title, interest and claim in and to the lands in controversy. (Rec. pp. 129, 130.)

5. That no fraud, imposition, or error has been shown to have entered into said transaction, or to have brought about said compromise decree. (Rec. p. 132.)

Argument.

The effect, therefore, of all that has been done by way of amended pleadings and new proofs, is to bring this case back to the situation in which it would have been before this court twenty years ago, if the features of the bill which made it a bill of review had been omitted. This court then found that there were negotiations for compromise commenced before the death of Alfred Bent; an agreement concluded afterwards, which was acquiesced in by the other parties, including the widow of Alfred, acting in behalf of her children; which agreement and compromise were advantageous to the infants, and were so considered and accepted by the court in their behalf. There is nothing in the proofs taken since, even if these conclusions of the court were re-examinable now, to weaken or modify them, but they are rather greatly strengthened by the additional facts in the record. The effort to overcome them by showing that the settlement was procured by fraud has totally failed. That was the only new element attempted to be introduced into the case since the mandate. Everything else was before the court on its former decision.

In the answer filed by Guadalupe Thompson and her husband to the Maxwell Company's original bill in 1871, the invalidity of the decree of 1866, and proceedings connected therewith, was distinctly alleged; as the following extracts from said answer (Rec. pp. 39, 40) will show:

"Respondents further answering say, that as to the proceedings alleged by complainants to have taken place at the term of the court held in and for

the county of Taos, on the ninth day of April, 1866, they beg leave to refer to the record of said court for a full, perfect and more certain answer herein without admitting the validity and legality of the same, but as administratrix and administrator as alleged in complainants' bill protesting against the same as illegal, unjust and void as to the minor children aforesaid.

"As to the allegations of plaintiffs touching the supposed order or decree and the effect of the proceedings in this Honorable court last above referred to, these respondents are not competent to answer, as they are advised that they are questions of law, wherefore they are all referred to this Honorable court for its decision. They deny, however, that by said proceedings the minor heirs of Alfred Bent, deceased, were in any manner divested of any title, either legal or equitable, they had at the time in the said grant or tract of land.

"These respondents admit that the said agreement was fully carried out in good faith by the said surviving plaintiffs, Teresina Bent, now Sheuriek, and Estefana Bent, now Hicklin, and their husbands so far as they were bound and affected by the same, by their respectively executing and delivering to the said Maxwell the conveyances referred to in complainants' bill, and that respondent, Guadalupe Thompson, also acted in good faith in making the pretended deed on her part, but that she was wholly ignorant of her duties, obligations and responsibilities as guardian, *ad litem*, of the minor children aforesaid, or as commissioner in chancery, to carry into effect, sales, c'c., and wholly ignorant of the rights of the said minors in the premises; but as to whether the said trust, or equitable interest, or claim of the said Alfred Bent, and his said minor heirs, was wholly terminated and extinguished, or not, respondents are not competent to answer; these likewise being questions of law referable to this Honorable court for decision; but they are advised that the said supposed deed of conveyance by the said Guadalupe Thompson

was illegal and void, and wholly inoperative so far as the right and interests of the said minors are concerned."

The question of the validity of the decree of 1866, and its effect in extinguishing the claim of the Bent heirs, was distinctly before this court upon the former hearing, and was necessarily a paramount question upon which the whole case turned. For if, as the answer alleged, the decree and all the other proceedings, including the deed of Guadalupe Bent, were "illegal and void as to the minor children;" and did not in any manner divest them "of any title, either legal or equitable, they had at that time in the said grant;" and were "wholly inoperative so far as the right and interests of the said minors are concerned;" then complainants' case, as then made, would have failed, not simply on a question of pleading, but on the merits, and their bill would necessarily have been dismissed. In holding, as this court did, that the bill should not be dismissed; and that "if, instead of seeking to reverse the decree of 1866, the bill had sought to carry that decree more effectually into execution, it would have been free from legal objection;" and that "the proofs show a case which supports the conclusions (of the decree) to the effect that the terms of compromise * * * were advantageous to the said infants, and were so considered and accepted by the court in their behalf;" that the decree itself "cannot be impeached, except for fraud in obtaining it;" and that finally "the whole question between the parties has been fully litigated on the proofs;" it must necessarily have passed upon every question which now is, or ever could be, raised as to the validity and effect of that decree and proceedings — with the sole exception of

those which might arise under a proper allegation of fraud — and decided them adverse to the allegations of the answer, both then and now.

This brings the case within the rule laid down in *Roberts vs. Cooper*, 20 How. 481, and quoted and restated as the settled doctrine of this court in *Kingsbury vs. Buckner*, 134 U. S. 670, viz.:

"It has been settled by the decisions of this court that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or re-examined upon the second."

Fraud, alleged since the mandate, and the only thing not before the court on the former decision, has been found to be nonexistent. The case is, therefore, *res adjudicata*, both as to the facts and the law, and it stands now before this court precisely as if the case had gone to final decree upon the bill as now amended, and the same proofs that were before the court in 1877. We thus have now, as then, a compromise, acquiesced in by all the parties, accepted by the court on behalf of the infants as advantageous to them; a decree which the court declared to be not of itself erroneous, and which, in the absence of fraud in obtaining it, cannot be impeached; and we have besides the one thing which was lacking before: a bill to quiet title based on these facts, instead of a bill of review. With this kind of a bill, the decree would have been affirmed by this court before, beyond any question. That upon the facts as they appeared then, and equally appear now, and with the bill changed as intimated in the opinion of the court,

complainants are entitled to the relief they now pray, and which has been decreed to them by the *nisi prius* and appellate courts of New Mexico, is the *law of this case*, as distinctly adjudicated by this court. No other decision seems possible now, on any theory, and argument on the proposition seems superfluous.

Respectfully submitted,

FRANK SPRINGER,
Counsel for Appellees.

No. 90.

Brief (Supp.) of Springer, Britton & Browne for Appellees

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Nov. 2, 1897.

GUADALUPE THOMPSON ET AL., APPELLANTS,
v.
THE MAXWELL LAND GRANT AND RAILWAY COMPANY ET AL.
No. 90.

Appeal from the Supreme Court of the Territory of New Mexico.

SUPPLEMENTAL BRIEF FOR APPELLES.

I.

THE LAW OF THE CASE—MATTERS RES ADJUDICATA.

The briefs of opposing counsel treat the former decision of this Court in this cause (Thompson *v.* Maxwell, 95 U. S. 391) as determining only a question of pleadings, to wit, that relief sought—the quieting of title in the Maxwell Company—could not be had upon a bill of review

but must be founded upon a bill in the nature of a bill to execute the prior consent decree of 1866. Upon that assumption all that this Court in fact decided, both in fact and law, is swept out of view of counsel upon the suggestion that it is pure *obiter*. Neither the assumption nor the authorities in its support can be applied hereto.

Manifestly, the *only* purpose of the Maxwell Company in filing the original bill was to *quiet* its title by a decree which should extinguish any possible latent equity thereafter to be claimed on behalf of the Bent heirs. No matter what its form, *that* was its express object. The bill as thus filed did not deny the validity of the 1866 decree, but necessarily assumed its validity. It simply suggested a possible doubt upon the title of the Maxwell Company, unless such doubt was removed by supplemental decree. But the defendants (who are the same defendants here) did in terms deny the validity of the 1866 decree as binding them or in any way affecting their interests. Thus by the pleadings it became an issue of fact, whether (1) a compromise was made as to them, and (2) whether it was actually carried out.

The proof taken upon these issues was before this Court when the cause first came here. It was the province of this Court to decide upon the narrow question of complainants' imperfect pleading, and upon that ground to *dismiss* its bill. But this Court did the exactly opposite thing of declaring that it would not dismiss the bill, but reverse and remand the cause in order to permit the bill to be amended to fit the relief required, so that on such amendment the final decree giving the complainants the relief they were found justly entitled to upon the proof might be entered. By thus keeping the cause in Court and passing judgment upon the facts this Court rendered *res adjudicata* all the issues of fact (except possibly the

allegation of fraud set up for the first time by the defendants after the cause was here determined) which the case now presents. It was part of the issue as made by the pleadings whether a compromise had been made covering the interest of the Bent heirs. For this was the foundation of the complainants' right to relief in equity, and was squarely denied by the defendants' answer. Yet this Court found :

"The effect of the evidence appears to be that although "negotiations were commenced before his death, no agree- "ment was concluded until after that event, *when it was* "*concluded by his brother-in-law, Scheurick, and was ac-* "*quiesced in by the other parties, including the widow of* "*Alfred, acting in behalf of her children.*" (Opinion, p. 399.

"The proof shows a case which, *in our judgment*, sup- "ports the conclusion of the decree, and the fact that the "terms of the compromise made by the adult parties to "the suit (including the mother and guardian of the in- "fant heirs of Alfred Bent) were advantageous to the said "infants, *and were so considered and accepted by the Court* "*in their behalf*" (p. 400).

Manifestly, it was upon these findings that this Court, in the exercise of its undoubted power and deliberate judgment, declined to dismiss the proceedings, but remanded the case for amendment, because, as the opinion further states (p. 400) :

"And as the whole question between the parties has "been fully litigated on the proofs, it would be unreason- "able to require that they should be taken over again."

We insist that these were express adjudications of the facts in issue, which, upon principle and authority, closed all further inquiry or adjudication thereon.

Otherwise, and in such a case, it would result that the

deliberate judgment of the Court in thus finding upon the facts would lull the complainant into security from which he would be rudely awakened, if, as a matter of law, the Court's opinion upon these facts was pure *obiter*, binding upon no one.

But as Mr. Wells, in his work on *Res Judicata* and *Stare Decisis* (p. 300), aptly remarks:

"SEC. 380. The decision of facts by a court of equity is "held to be conclusive on the parties, even if the bill is "finally dismissed on the ground that there is an ade-"quate remedy at law." * * *

The authorities cited on our original brief, and the most recent adjudication of this Court—The Southern Pacific case (71 of present term)—are ample to demonstrate that these findings of fact in this case are conclusive here on this second appeal.

THE LAW OF THE CASE.

This has been directly determined by the prior decision, and to the points:

First. That the consent decree involved is not of itself erroneous, and "In the absence of fraud in obtaining it, "such a decree cannot be impeached." (Op. 398.)

Second. That the decree of September, 1866, upon grounds of public policy as applicable to the security of judgments, has passed into *rem adjudicatem*, and, except for fraud, is not subject to reversal.

The law on this subject cannot be more conclusively or forcibly stated than as given by Mr. Wells in his work *supra*, p. 569 *et seq.*

We may add, with great propriety, that the former decision on the points of law stated simply applies well-settled principles.

II.

Status of Maxwell Land Company.

Neither the decree of 1865 nor the consent decree of 1866 stands *per se* as a muniment of legal title. Neither was self-executing and neither, in the absence of statute so declaring, could pass title, except by some formal conveyance.

In that situation, it is important to note that when the Maxwell Company purchased in 1870, these deeds from the Bent heirs were of record; the company admittedly purchased for a large consideration, and had the right to stand upon the recorded chain of title. The recorded deed from Guadalupe Bent, as guardian *ad litem*, etc., recites on its face the order of 1866, entered by the Court, authorizing her to make such deed. Assuming such recital to have put the company upon notice of this chancery proceeding, brought by the Bent heirs, the company, in resorting to such record, would have found only the decrees of 1865 and 1866, without the pleadings or proof on which they were entered, for it is a fact, appearing by the record in the former case, that it was not until 1872 or 1873 that *any* of the pleadings in the cause were found, and it is the express finding of the Court below on this appeal (Rec. 130) that the record of this chancery proceeding does not show whether or not any inquiry was made by the Court or by its authority concerning the value of the land or as to the disposal thereof for the best interests of the infant heirs, &c. In that state of the record, the company had the right to invoke, on its behalf, those presumptions which the settled wisdom of judicial tribunals has constantly exercised in assuming that in ways proper and sat-

isfactory to the chancellor he had learned the facts, and determined the wisdom of making the compromise on behalf of the infant heirs. Or to state it in the language of this Court in the former decision, that the terms of compromise "were advantageous to the said infants, and were "so considered and accepted by the Court in their be-"half."

In other words, the record, so far as then available, gave the Maxwell Company and any other purchaser the full right to rely upon the orders of the Court allowing this compromise, and to assume that the facts had been stated with full authority and acquiesced in by the Court in the exercise of sound judgment. All collateral facts sustain that conclusion. (1) With respect to price, the heirs of Beaubien had sold to Maxwell their undoubted legal title for consideration much less than the record shows was paid to the heirs of Bent for the compromise of a doubtful and litigated claim; and (2) the inventory upon the estate of Alfred Bent, which disclosed that the decedent's debts largely exceeded his personal estate. Therefore, the conclusion is fully justified that the compromise of this claim was necessary to furnish the infant children of Bent with necessary maintenance. The findings of fact upon present appeal do not alter but affirm these conclusions, and hence the record under present discussion, nearly thirty years after the fact, shows nothing on which to challenge the correctness of the conclusion indulged in 1870 by the Maxwell Company.

Moreover, that company, as a purchaser for value, and its numerous grantees who have since purchased from it, are far more entitled to the protection of a court of equity than are the appellants. For it must be remembered that the order of the Court admitting the infant heirs as complainants, and its decrees authorizing the sale and con-

veyance of their interests, were made upon the motion of counsel acting for the Bent family. It was a family settlement in which all were interested, and which obviously all desired to have carried out. With respect to the heirs of Bent, it was completing an arrangement for compromise initiated by their ancestor in his lifetime. This fully answers all *technical* argument now indulged attacking the form or correctness of the judicial orders and decrees on which this family settlement was effected. The fact that these proceedings were required by Maxwell, a purchaser in no just sense, throws the onus of blame or liability therefor upon the Maxwell Company, a subsequent purchaser. It was not the interest or claim of the Alfred Bent heirs *alone* that was the subject of compromise, but the extinguishment of the entire claim of the Bent family. The shafts of argument attacking the technical correctness of proceedings taken by appellants' own counsel and in effecting a family settlement cannot strike the Maxwell Company as a subsequent purchaser, nor should a court of conscience so apply them. It must also be remembered that the proceedings took place at a time when New Mexico was part of the frontier, remote from railroads, and judicial proceedings were not and could not be conducted with that absolute precision which marks those sections in which all the conveniences of civilization are at hand, with well-stocked libraries accessible to bench and bar. The partition suit in this case is docketed as Cause No. 1, in chancery, for the District Court of Taos county, and we may remark in passing that the mind which framed the decree of 1865, then headed same as a—

"Bill in Chancery for Partition of Real Estate."

(Record, 23.)

We repeat, in a word, that orders and decrees entered in such early days and under such frontier conditions, and on the motion of parties to be benefited thereby—the Bent family—cannot now be subject to microscopic examination, and with resulting destruction of the titles of innocent subsequent purchasers, without doing violence to all notions of both moral and legal equity.

It is well settled that rights of infants in equity stand subordinate to those who purchase for value.

Am. & Eng. Eng. of Law, vol. 10, *p.* 696, *and authorities cited.*

And this doctrine applying to legal estates of infants must have stronger application here with respect to mere equities and to the compromise of a doubtful and litigated claim.

III.

Payment of Compromise Price.

Supplementing our original brief, we desire only to suggest—

1st. The facts now found show the note given in payment was delivered to Maxwell, the maker thereof, and grantee of the Bent interest. The explanation of Thompson that it was so delivered for the purpose of having a credit endorsed thereon is wholly untenable. Such delivery and continued retention thereof by the maker raises the presumption of payment, which must stand, unless rebutted by controlling proof. The rule is concisely stated by Mr. Greenleaf, in his work on evidence, sec. 38, thus:

"Thus, where a bill of exchange, or an order for the "payment of money, or delivery of goods, is found in the "hands of the drawee, or a promissory note is in the "possession of the maker, a legal presumption is made "that he has paid the money upon it and delivered the "goods ordered."

The same rule is repeated in *Am. & Eng. Enc. of Law*, *Vol.* 18, *page* 206, with citation of many authorities in its support.

The situation of the parties; the obvious desire of the Bent family, all and singular, to make this compromise and receive money in lieu of a litigated and doubtful claim, all combine to increase the force of this presumption in the present case. It may well be that payment was made in whole or in part with personal property. Exchange and barter is the rule of frontier civilization, remote from railroads and with necessarily limited circulation of money. But we submit this Court will not, more than thirty years after the fact, assume against subsequent purchasers that payment was not made.

2nd. The Maxwell Company had the *right* to rely upon the consideration expressed in the deed from Guadalupe Bent as conclusive in matter of amount and payment, for the rule is well settled that—

"it is competent to prove by parol what the real consid-"eration agreed to be paid was, and to show that the "same or some part of it remains unpaid, *though not* "*thereby to impeach the title conveyed by the deed.*"

Washburn on Real Property, *Vol.* 3, *p.* 327, 619.

The consideration may remain a matter of indebtedness, with the right to sue therefor as on a money demand between the grantor and grantee. Manifestly, it cannot

affect subsequent purchasers taking without notice of its non-payment.

The long pursuit of the patent upon the grant from the United States; the Government's attack thereon and the necessary and great expense imposed upon the Maxwell Company in making of surveys, and subsequent litigation with the United States, are matters familiar to the Court, and are disclosed by its own records (121 U. S. 325; 122 *ib.* 365). In all this effort and expense, involving many thousands of dollars and years of labor, the present appellants contributed nothing, but they are eager to seize and enjoy the fruit of the toil and expenditure of those whose sole fault is that they relied upon solemn records and judicial decrees which are now sought to be impeached by technical arguments from learned counsel. Thousands of individuals hold title to town and farm property, by conveyance from the Company, within this grant. Its development and disposal has proven a most costly enterprise. We submit, these appellants are not entitled to disturb these titles under the case as now presented in this record.

Respectfully submitted.

FRANK SPRINGER,
A. T. BRITTON,
A. B. BROWNE,
Counsel for Appellees.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1897.

No. 91.

CHARLES BENT ET AL.,
Appellants,
vs.
GUADALUPE MIRANDA
ET AL.,
Appellees.

Appeal from the Supreme Court of the Territory of New Mexico.

BRIEF FOR APPELLEES.

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STATEMENT.

This in an appeal from a judgment of the Supreme Court of New Mexico affirming a decree of the Fourth

Judicial District Court in and for Colfax county, in favor of appellees, dismissing the bill of complaint, which was brought to review; impeach and annul a final decree of the District Court for Taos county, entered in September, 1866, and to re-establish a previous interlocutory decree of the same Court, entered in June, 1865.

The subject of the present litigation is the undivided one-twelfth interest in the Beaubien and Miranda Grant, or Maxwell Grant, as it is now usually called. In its various forms the controversy has extended over a period of thirty-eight years, and has been five times before the Supreme Court of the Territory and twice before this Court. Although the case has been made to appear complicated by reason of the number and variety of the proceedings taken in it, yet the question presented for decision, when rightly understood, is really a simple one. This will be greatly facilitated by an orderly history of the case, which I shall endeavor to give at the outset.

Being an equity cause, tried by the Court without a jury, the evidence is not embodied in the record, but instead of it the Territorial Supreme Court has certified and sent up as part of the record a statement of the facts established by the evidence in conformity with the Act of Congress, approved April 7, 1874. (18 Stat. at Large, p. 27.) This statement is found on pages 45 to 77 of the Record, and it is conclusive as to the facts.

San Pedro Co. v. *United States*, 146 U. S. 130.

In the history which follows, the facts are taken from the statement aforesaid, and in order to avoid needless repetition, I shall interpolate some discussion of questions that arose in the antecedent stages of the litigation, and which bear upon the issues presented in the case now before the Court.

HISTORY OF THE LITIGATION.

The Maxwell Land Grant was made by the Government of Mexico in 1841 to two persons, namely, Charles Beaubien and Guadalupe Miranda. They entered into possession of it in 1843, and thenceforward they and their heirs and vendees continued to possess and occupy it exclusively and for their own use and benefit, claiming the ownership thereof. In October, 1859, Alfred Bent and his two sisters, Estefana and Teresina (the former the wife of Alexander Hicklin and the latter soon after becoming the wife of Aloys Scheurich), set up a claim to one-third of the property.

They began an action in chancery in the District Court for the county of Taos, against Beaubien, Miranda and Maxwell—the latter having acquired an interest in the grant by purchase from the others—in which they claimed to be the owners of an undivided one-third of the grant, and prayed a partition thereof. These complainants were the children and heirs-at-law of one Charles Bent, who had died in 1847 at Taos; and it appears by their original and amended bill of complaint that the foundation of their claim was a "*verbal understanding*" (Rec., p. 47) between their father, Charles Bent, and the grantees, Beaubien and Miranda, by which in consideration of the "*exertion, influence, and instrumentality*" of Bent, through which the "grant was obtained from the Mexican Government" (Rec., p. 46),* or, as otherwise stated, his "*aid, assistance, and influence in and about the procuring said grant from the Mexican Government*" (Rec., pp. 49–50), they were to "*give to him*" the undivided one-third of

* The references in this brief are to the Record in No. 91, except where otherwise stated.

the grant. No other consideration was alleged; nor was it alleged that this supposed verbal understanding was ever carried into effect by the execution of any conveyance, or by the delivery of possession to Bent; nor that Charles Bent had ever asserted or claimed ownership in or possession of the grant or any part of it, although he resided at Taos, within a short distance from the property, for four years after the grantees were formally invested with possession by the Mexican authorities. No writing of any description was pleaded or produced, or claimed to exist, either as evidence of the contract itself, or of its execution.

The defendants were required by this bill to make answer upon oath, which they did; and their answers have, therefore, the force of evidence.

Miranda answered that he knew of no such interest or connection of Bent in or to the grant. (Rec., p. 52.)

Beaubien's answer denied absolutely the fact of the alleged agreement or understanding, or of the pretended consideration therefor; but stated that he at one time in conversation told Bent that if he obtained the grant he would make Bent a present of one-fourth part, but not an undivided part. And he further said that from the time the grant was made up to the death of Bent in 1847, he did not offer, nor did Bent request him, to carry into effect such verbal promise. He stated that the grant was obtained mainly by the exertions of Miranda, who became an equal participant with him therein. He says that he once offered to donate a tract of land within the grant to Bent's children, out of kind feeling for them, which they refused to accept. He denies that Bent ever rendered any service in obtaining the grant; or that he or Miranda had ever acknowledged or recognized Bent as having an interest in the grant; or that Bent or his heirs ever con-

tributed to the settlement, protection, or defense of the grant. (Rec., p. 53.)

Issue was joined on these answers, and the case finally came to a hearing in June, 1865.

It is evident that the complainants, on their own showing, had no shadow or semblance of an interest in the property which would entitle them to a partition. Taking the allegations of their bill to be true, their only claim to title rested upon an unexecuted parol agreement to *give* an interest in land, unaccompanied by delivery of possession or part performance of any kind; and without any consideration except an alleged one which would have rendered the whole contract, if otherwise proved by competent evidence, absolutely void.

An agreement for the conveyance of land, resting solely in parol, is void by the Mexican law. If unaccompanied by delivery of possession, or part performance, it could not be enforced either under Mexican or American law.

Harris v. *Brown*, 1 Calif. 98.

Hoen v. *Simmons*, 1 Calif. 120.

Stafford v. *Lick*, 10 Calif. 16.

No authority can be produced, either under the common law or the civil law, holding that an interest in land, either legal or equitable, can pass by such an agreement, even if it were free from the fatal taint of illegality.

But such a contract, for a contingent compensation for procuring legislative and executive action in disposing of public property to individuals, is void, no matter whether the contract contemplated the use of improper means or not. All such arrangements are held to be against public policy, and the courts everywhere, both State and Federal, refuse to recognize or enforce them.

Marshall v. *R.R. Co.*, 16 How. 334.

Toll Co. v. *Norris*, 2 Wall. 54.
Trist v. *Child*, 21 Wall. 441, 448.
Fuller v. *Dane*, 18 Pick. 472.
Chippenger v. *Hepbaugh*, 5 Wats & Serg. 315.
Rose v. *Truax*, 21 Barb. 361.

No testimony appears in the record, though it is presumable that some was taken, in view of the recital in the interlocutory decree that the case was heard on the pleadings and the testimony taken in the cause. (Rec., pp. 113–114.) It is not possible that any better case could have been made out for complainants than that stated in their bill; while in the nature of things it is in the highest degree improbable that any testimony could have been produced to overcome the sworn answers of the two defendants denying the parol agreement.

Nevertheless, for some reason not apparent at this remote day, the Court rendered an interlocutory decree finding the equities in favor of complainants—not for the interest claimed in their bill, but for a different one—and directed partition to be made accordingly. This decree is one of the pivotal facts upon which the present litigation turns, and a correct apprehension of its character and effect will, in my opinion, lead to an easy solution of the whole controversy.

I therefore invite the Court, at the outset, to a consideration of two things:

1. *What was this decree?*
2. *What was its effect?*

1. Purport of the Decree of 1865.

The decree of June 3, 1865, is found on pages 58 to 62 of the Record. Stripped of its verbiage, it is to the following purport:

1. It finds that Charles Bent "was justly and equitably entitled and seized of one undivided fourth part" of the grant; and that the complainants, Alfred, Estefana, and Teresina, succeeded to his interest, and are "fully and and absolutely entitled" thereto; and the same is declared established and confirmed to them; and

2. It orders that partition be made of one-fourth to them, and the other three-fourths in two equal shares, the one to Maxwell, and the other to the son and daughters of Beaubien.

3. It appoints commissioners to make the partition, under certain regulations and conditions prescribed in detail, which require them to examine and consider the various qualities of land, the improvements made by Maxwell under Beaubien and Miranda, and make a proper allowance therefor; and to assess the value of the land covered by such improvements without their being added to the land, and also the value of the improvements by themselves; "and report the facts with their general report to the Court, . . . *so that the Court may decree justly and equitably concerning the same between the parties.*"

4. It orders the commissioners to assess and report the value of the rents and profits of the portions occupied and cultivated.

5. It orders the commissioners to make full report of their proceedings to the next term of the Court.

6. It declares that "*the Court now reserves and suspends making its decree as to the partition and payment of the costs in this cause until a future term of this Court.*"

7. It orders that "this cause stand continued until the next term of this Court."

It is this preliminary decree, never carried into effect, under which the commissioners never acted or reported, and which was afterwards vacated by the Court which

entered it, which our opponents claim to have the effect of converting the shadowy and inequitable claim of the Bent heirs into a legal title, beyond the reach of the Courts to disturb.

It is plain from the reading of this order, that while the Court found and defined what were the relative interests of the parties in the first instance, yet it also perceived that there were a number of important things to be ascertained and considered before it could finally adjust the equities of the case and divide the property. There was much more of this preliminary work to be done than is usual in partition suits; and, therefore, the Court, not content with leaving the nature of this order to be interpreted by the well-known rules governing partition proceedings, in express terms reserved its decree as to the partition until a future term, and continued the case.

2. Effect of the Decree of 1865.

This statement of the provisions of the order of June 5, 1865, is sufficient to show that it was not a final decree, but that it was a mere interlocutory order. It created no estate, conferred no title, and did not even put the parties in a position to appeal from the finding of the Court as to the moieties. It was the ordinary interlocutory decree in partition suits, and was fully within the control of the Court which made it; and might be revised, modified, or vacated by the Court for any reason that might seem proper, at any time until the final decree upon the report of the commissioners.

It is important to remember that at the date of this decree in 1865, and prior thereto, there was in New Mexico no statute conferring jurisdiction on courts of chancery to establish and quiet title to lands. The existing statute on that subject was enacted in 1884.

Session Laws of New Mexico, 1884, *Chap.* 6.

Nor was there any statute providing for the partition of real estate. That law was passed in 1876.

Session Laws of New Mexico, 1876, *Chap.* 3.

And the amendment to it authorizing an appeal from the first decree in partition determining the interests in 1893.

Session Laws of New Mexico, 1893, *p.* 25.

Such a decree as this was is not final, and cannot be appealed from.

Freeman on Judgments (2nd Ed.), secs. 29–34.

Freeman on Co-Tenancy and Partition, sec. 319, and cases cited.

Phillips, Supreme Court Practice, 85–95.

This is the settled doctrine of this Court:

Perkins v. *Fourniquet*, 6 How. 206, and 16 How. 82.
Pulliam v. *Christian*, 6 Id. 210.
Craighead v. *Wilson*, 18 Id. 199.
Beebee v. *Russell*, 19 Id. 283.
Hunniston v. *Stainthorp*, 2 Wall. 106.
Green v. *Fisk*, 103 U. S. 518.
Bostwick v. *Brinkerhoff*, 106 U. S. 3.
Grant v. *Phœnix Ins. Co.*, 106 U. S. 429.
Parsons v. *Robinson*, 122 U. S. 112.
Keystone Co. v. *Martin*, 132 U. S. 91.
Lodge v. *Twell*, 135 U. S. 232.
McGourkey v. *RR. Co.*, 146 U. S. 536.

Also of the Supreme Court of New Mexico:

Huntington v. *Moore*, 1 N. M. 471.

And of various State Courts:

Ivory v. *Delore*, 26 Mo. 506.
Durham v. *Durham*, 34 Mo. 447.

Pirkin v. *Allen*, 29 Mo. 233, 236.
Griffin v. *Griffin*, 10 Ind. 170,
Cook v. *Knickerbocker*, 11 Ind. 230.
Chester v. *Gibson*, 15 Ind. 10.
Williams v. *Field*, 2 Wis. 421.
Dickinson v. *Godwise*, 11 Paige 191.
Kuster v. *Stark*, 19 Ill. 328.
Delashal v. *Geiser*, 36 Kas. 374.
Holloway v. *Holloway*, 97 Mo. 628.
Turpin v. *Turpin*, 88 Mo. 337.
Murray v. *Yerkes*, 73 Mo. 13.
Medford v. *Harrel*, 3 Hawks. (N. C.) 41.
Bybee v. *Summers*, 4 Oregon, 354.
Beebee v. *Griffin*, 6 N. Y. 464.
Lee v. *Henderson*, 75 Tex. 190.
Furman v. *Furman*, 12 Hun. 441.

The first decree in partition, ascertaining the moieties and directing a partition, is only an interlocutory decree.

Freeman and Co-Tenancy and Partition, sec. 516
17 Am. and Eng. Encyl. of Law, 749–751.

"In suits for partition the Court must determine the interests of the co-tenants, and whether partition shall be made by sale of the property or otherwise; but it is not until the confirmation of the partition, either by sale or allotment, that a final decree exists."

1 Freeman on Judgments (2d Ed.), sec. 32.
5 Am. and Eng. Encyl. of Law, 371, 373.
Williams v. *Field*, 2 Wis. 421.

In 17 Am. and Eng. Encyl. of Law, pp. 748–9, the character and effect of the judgment for partition, upon the latest authorities, is given as follows;

"After the disposition of the issues, or upon the coming in of the report of a referee in a proper case, an inter-

locutory judgment for partition should be given. It is the province of this judgment to determine and declare all the rights, titles, and interest of the parties, and of each of them, in the property, leaving nothing open or in reserve, except mere matters of detail in carrying it out." (P. 749.)

"The interlocutory judgment, in an action for partition, directing a division or sale of the premises in question, is *not a final decree*, but *merely an interlocutory* order." (P. 751.)

All interlocutory decrees are under the control of the Court which made them until final decree, and may be revised or vacated if the Court thinks proper.

Fourniquet v. *Perkins*, 16 Howard, 82.
Gibson v. *Reese*, 50 Ill. 383.
Gibson v. *Crehore*, 5 Pick. 157.
Park v. *Johnson*, 7 Allen, 378.
Davis v. *Roberts*, 7 Sm. & M. 543.
Kelley v. *Stanberry*, 18 Ohio, 408.
2 Dan. Chy. Pr., 1511, note 1.

And may be set aside at a term subsequent to that at which they are entered.

Com. v. *Beaumarchais*, 3 Call. (Va.) 122.
Dobbs v. *Dobbs*, 27 Ala. 646.
Thompson v. *Peebles*, 6 Dana (Ky.) 387.

In support of the proposition that the interlocutory decree of 1865 was final, appellants rely chiefly upon the case of *Forgay* v. *Conrad*, 6 How. 201.

Examination of the opinion in that case shows that the decision was based upon peculiar circumstances, and was distinctly limited by the Court to the facts of the case, which readily distinguish it from other cases involving the question of finality of decrees. Under no possible construction can it be made an authority for a case like

the one at bar. The following quotation from the opinion will show this clearly:

"Here the decree not only decides the title to the property in dispute, and annuls the decision under which defendants claim, but also directs the property in dispute to be delivered to complainant, and awards execution. And according to the last paragraph in the decree, the bill is retained merely for the purpose of adjusting the accounts referred to the Master. In all other respects the *whole of the matters brought into controversy by the bill are finally disposed of* as to all of the defendants, and the bill as to them is *no longer pending before the Court*, and the decree which it passed could not have been afterwards reconsidered or modified in relation to the matters decided, except upon a petition for a rehearing within the time prescribed by the rules of this Court regulating proceedings in equity in the Circuit Court. If these appellants, therefore, must wait until the accounts are reported by the Master and confirmed by the Court, they will be subjected to irreparable injury. For the lands and slaves which they claim will be taken out of their possession and sold, and the proceeds distributed among the creditors of the bankrupt, before they can have an opportunity of being heard in this Court in defense of their rights."

The Court then, by way of emphasizing the fact that this was an exceptional case, criticised the action of the lower Court in entering the final decree; pointed out the difference between the practice in England, where appeals to the House of Lords may be taken from an interlocutory order which decides the right of property in dispute, and in the United States, where such appeals cannot be taken; and then said further:

"In the case before us, for example, it would certainly have been proper and entirely consistent with chancery practice, for the Circuit Court to have announced, in an interlocutory order or decree, the opinion it had formed

as to the rights of the parties, and the decree it would finally pronounce upon the title and conveyances in contest. But there could be no necessity for passing immediately a final decree, annulling the conveyances, and ordering the property to be delivered to the assignee of the bankrupt. The decree upon these matters might and ought to have awaited the master's report; and when the accounts were before the Court, then every matter in dispute might have been adjudicated in one final decree; and if either party thought himself aggrieved, the whole matter would be brought here and decided in one appeal."

In the very next case, *Perkins* v. *Fourniquet*, 6 How. 206, 208, the Court gave a practical illustration of the operation of the rule it had laid down in *Forgay* v. *Conrad*. This was an action for an accounting, and the partition of community property—not for an accounting alone, as appellants say in their brief.

The existence of any community was denied by the answer. Upon the hearing the Circuit Court passed a decree declaring that a community existed; that the plaintiffs had "the right to recover" a certain share of the community property; referred the matter to a Master to take and report an account of the acquests, prescribing fully and with proper precision the principles and manner in which the lands acquired were to be divided and the accounts taken; and reserved all other matters in controversy between the parties until the coming in of the Master's report. Upon appeal from this decree this Court said:

"This clearly is not a final decree in any respect. It is the common and ordinary interlocutory order or decree passed by courts of chancery in cases of this kind, and is absolutely necessary to prepare the case for a final hearing and final decree, where the complainant is entitled to a *partition of property* or an account. For the principles

upon which an account is to be stated by the Master, *or a partition made*, cannot be prescribed by the Court until it *first determines the rights of the parties by an interlocutory order or decree:* and the case cannot proceed to final hearing without it. And the appellant is not injured by denying him an appeal in this stage of the proceedings. Because *these interlocutory orders and decrees remain under the control of the Circuit Court, and subject to their revision*, until the Master's report comes in and is finally acted upon by the Court, and the whole of the matters in controversy between the parties disposed of by a final decree. And upon an appeal from that decree, every matter in dispute will be open to the parties in this Court, and they all be heard and decided at the same time."

The subsequent history of this case presents a clear illustration of the nature and effect of such interlocutory decrees, and of the control which the Courts have over them. After the dismissal of the appeal and remanding of the cause, pursuant to the decision in 6 Howard, it proceeded as far as a hearing on the Master's report, when the Circuit Court "reconsidered the opinion it had expressed on the merits in the interlocutory order, and believing that opinion to be incorrect, dismissed the plaintiff's bill."

Fourniquet v. *Perkins*, 16 How. 82 (quoted from opinion by the Chief Justice on p. 84).

Plaintiffs then appealed to this Court, contending that the action of the Circuit Court was erroneous, "because made at the argument made upon exceptions to the Master's report, and is contrary to the opinion on the merits expressed by the Court in its interlocutory order." Thereupon this Court said:

"This objection cannot be maintained. The case was at final hearing at the argument upon the exceptions, and

all of the previous interlocutory orders in relation to the merits were open to revision and under the control of the Court. This Court so decided when the former appeal hereinbefore mentioned was dismissed for want of jurisdiction. And if the Court below, upon further reflection or examination, changed its opinion, after passing the order, or found that it was in conflict with the decision of this Court, it was its duty to correct the error."

This doctrine has been reaffirmed by the Court in a recent case.

"In decretal orders, the whole case is open for review, and the Court may change its rulings relating to the merits when the cause comes on for final hearing upon the account. *Fourniquet* v. *Perkins*, 16 How. 82."

Latta v. *Kilbourne*, 150 U. S. 540.

Craighead v. *Wilson*, 18 How. 199, was an action in chancery by certain heirs claiming interest in an estate, to establish their rights and have distribution of the property. The Court made a decree, ascertaining the heirship and relative rights of complainants, and referring the matter to a Master to take an account, to ascertain what property in kind remains in possession of defendants; the sale and profits thereof; to make allowance for improvements, etc. From this decree an appeal was taken, which was dismissed by this Court, saying:

"In no legal sense of the term is the decree now before us a final one. The basis of the decree, embracing the equities in the bill, is found, but the distribution among the parties in interest depends upon the facts to be reported by the Master. . . . Until the Court shall have acted upon this report and sanctioned it, giving to each of the devisees his share of the estate under the will, the decree is not final."

In *Beebee* v. *Russell*, 19 How. 283, this Court finds it necessary to instruct the *nisi prius* Courts, by giving elementary definitions of the two kinds of decrees:

"A decree is understood to be interlocutory whenever an inquiry as to the matter of law or fact is directed, preparatory to a final decision. Where the decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the Court, so that it will not be necessary to bring the cause again before the Court for its final decision it is a final decree."

In *Lodge* v. *Twell*, 135 U. S. 232, the Court holds that when the thing left to be done was something more than the mere ministerial execution of the decree as rendered, "the decree was interlocutory and not final, *even though it settled the equities of the bill.*"

The same authorities relied on by appellant to prove that this was a final decree were reviewed by this Court in *McGourkey* v. *R.R. Co.*, 146 U. S. 536, 545, *et seq.* The Court cites with approbation the two cases in 6 Howard, viz., *Perkins* v. *Fourniquet*, 206, and *Pulliam* v. *Christian*, 209, and says of *Forgay* v. *Conrad*:

"The case of *Forgay* v. *Conrad* has generally been treated as an exceptional one, and as was said in *Craighead* v. *Wilson*, 18 Howard, 199, 201, as made under the peculiar circumstances of that case, and to prevent a loss of the property, which would have been disposed of beyond the reach of an appellate Court before a final decree adjusting the accounts could be entered. A somewhat similar criticism was made of this case in *Beebe* v. *Russell*, 19 How. 283, 287, wherein it was intimated that the fact that execution had been awarded was the only ground upon which a finality of the decree could be supported."

And the Court once more states the general rule as follows (p. 545):

"It may be said in general that if the Court make a decree *fixing the rights and liabilities* of the parties, and thereupon refer the case to a Master for a ministerial purpose only, and no further proceedings in Court are contemplated, the decree is final; but if it refer the case to him as a subordinate Court and for a judicial purpose, as to state an account between the parties, *upon which a further decree is to be entered*, the decree is not final."

The rule in New Mexico as to appeals from orders and decrees in chancery, under the law as it existed in 1865, was announced in

Huntington v. *Moore*, 1 N. M. 417.

There the Supreme Court of the Territory pointed out clearly the distinction between interlocutory and final decrees, and held that under the Organic Act and statutes of the Territory none but final decrees and judgments, which "finally dispose of the merits in the case," were appealable. The decree appealed from directed the payment of a sum of money by defendants to plaintiff "to be credited to defendants on the final accounting." It was claimed that this was final, because it directed the absolute payment of money immediately, and was enforceable by execution; and there, as here, the case of *Forgay* v. *Conrad* was relied on to sustain the contention. The Court held that that case could not apply, because in *Forgay* v. *Conrad* "the whole of the matter brought into controversy by the appeal was finally disposed of." The Court said:

"Orders are frequently and necessarily made during the progress of a cause, and while such orders may and

frequently do affect and enter into the merits of the cause, they are interlocutory only, and intended as a means of advancing the interest of the parties under the control of the Court until the rights of the parties can be adjudicated by a final decree. * * * The order in the case before us was made during the progress of the case, and while it was an order for the payment of a specified sum of money, and affected and entered into the merits of the cause, it was not final, for the reason that it did not dispose of the merits of the whole case." (P. 474.)

The appeal was accordingly dismissed.

Nevertheless it is contended by appellants, with much elaboration in their briefs, that within the rule laid down in these authorities the decree in question was final, because they say that it left only ministerial acts to be done by the commissioners. A simple reading of the decree, with its explicit direction to the commissioners to report upon a multitude of facts "so that the Court may decree justly and equitably concerning them," and its reservation in express terms of its decree as to the partition "until a future term," ought to dispose of that contention.

But as a complete and final answer to appellants' entire argument on this question, we quote the decision of this Court in—

Green v. *Fisk*, 103 U. S. 518.

That case was a direct action for partition of real property. Complainant was decreed to be the owner of one-half of the property, and the case was referred to a Master "to proceed to a partition according to law, under the direction of the Court." Defendant appealed from this decree, but the appeal was dismissed because the decree was not final.

This Court said:

"In partition causes, courts of equity first ascertain the rights of the several persons interested, and then make a division of the property. After the division has been made and confirmed by the Court, the partition, if in kind, is completed by mutual conveyances of the allotments to the several parties. Mitford, Eq. Pl. (4th ed. by Jeremy) 120; 1 Story, Eq., sect. 650; 2 Daniell, Ch. Pr. (4th Am. ed.) 1151.

"A decree cannot be said to be final until the Court has completed its adjudication of the cause. Here the *several interests* of the parties in the land have been *ascertained and determined*, but this is merely preparatory to the final relief which is sought; that is to say, a setting off to the complainant in severalty her share of the property in money or in kind. *This can only be done by a further decree of the Court.* Ordinarily, in chancery, commissioners are appointed to make the necessary examination and inquiries and report a partition. Upon the coming in of the report the Court acts again. If the commissioners make a division the Court must decide whether it shall be confirmed before the partition, which is the primary object of the suit, is complete. If they report that a division cannot be made and recommend a sale, the Court must pass on this view of the case before the adjudication between the parties can be said to be ended.

"In this case a partition by sale was asked for, because the property was not susceptible of division in kind. That the Court has not ordered, and the reference to the Master was undoubtedly to ascertain, among other things, whether such a proceeding was in fact necessary in order to divide the property. The Master was in everything to proceed under the direction of the Court. He had no fixed duty to perform. He was the mere assistant of the Court, not in executing its process, but in completing its adjudication of the partition which was asked. There are still questions, in which the parties have each a direct interest, and *they must be determined judicially* before the relief has been granted which the suit calls for.

"In foreclosure suits it has been held that a decree which settles all the rights of the parties and leaves nothing to

be done but to make a sale and pay over the proceeds is final for the purposes of an appeal. The reason is that in such a case the sale is the execution of the decree of the Court, and simply enforces the rights of the parties as finally adjudicated. *Here, however, such is not the case, because still the Court must act judicially in making the partition it has ordered. What remains to be done is not ministerial but judicial.* The law has prescribed no fixed rules by which the officers of the Court are to be governed in the performance of the duty assigned to them. The Court is still to exercise its judicial discretion in directing the movements and approving the acts of its assistants, until it has finally settled and determined on the details of the partition, if made in kind, or directed a sale by the ministerial officers and prescribed the rules for a division of the proceeds."

It is argued in appellants' brief that the labor and expense of making the partition *should* not be required as a condition precedent to the right of appeal, because it was a hardship. But it *was* invariably required, and it was to obviate this very difficulty that statutes have been passed in various States allowing an appeal in partition suits from the interlocutory decree—among them that of New Mexico in 1893.

Such being the character and effect of the interlocutory order of June, 1865, what was the situation of the parties and the case, after the adjournment of that term? Naturally, the defendants were dissatisfied with the finding of the Court in favor of complainants, and with the order for partition, and proposed to appeal whenever the case reached the point at which an appeal could be taken. As it was then they could not appeal, but must wait until after the commissioners had reported and the Court had adjusted the equities from the information thus obtained,

and had made its final decree as to the partition.* In the meantime the case, with all its interlocutory orders, remained in the control of the Court. It could vacate any of these orders. It could dismiss the bill for want of equity, or because the complainants had shown no title authorizing partition, thus leaving nothing to be partitioned. Nothing had been finally adjudicated, nothing was settled. And it was this consideration—a certainty of protracted litigation, involving large costs and expenses, ending no one knew when—that brought about the compromise which followed, and which is the next important matter in the order of events.

The commissioners appointed by the order of June, 1865, never acted. (Rec., p. 62.) Maxwell, who had in the meantime acquired the interests of Maranda and Beaubien's heirs, declared that he would appeal the case, and if necessary carry it to the Supreme Court of the United States. The Bent heirs, complainants in the suit, entered into negotiations with Maxwell for a compromise of the litigation, on the basis of Maxwell's paying them a money consideration to relinquish their claim. (Rec., p. 62.)

Here let us stop to inquire: What was the claim which they had to relinquish?

This is the question to which much of the subsequent proceedings relate back, and upon it the entire case of our opponents absolutely depends. Unless their interpretation of the nature of the Bent claim at this juncture is correct, their whole case falls to the ground. Even if it should be correct, however, their case will fail completely for other reasons.

* No statute then existed in New Mexico allowing an appeal from the decree determining the moieties in partition: the present statute to that effect was passed February 2, 1893.

Laws of New Mexico, 1893, p. 25.

They contend that by virtue of the interlocutory decree of June, 1865, an absolute legal estate in one-fourth of the property became vested in the Bent heirs, and that such estate was thereby conclusively and finally established in them, and that all future proceedings by which their claim was sought to be relinquished, transferred or extinguished, must be tested by the strict rules applicable to the disposal of perfect legal estates.

But the mere statement of the facts already given shows this position to be utterly untenable. Even so far as it went, the decree, as I have shown by the overwhelming authorities already cited, was conclusive upon nobody. It was still within the control of the Court which rendered it, and could be modified or vacated at any time before the final decree should be made, after the coming in of the commissioners' report. The suit was still pending. "Pendency of the suit," as stated in *Kester* v. *Stark*, 19 Ill. 330, being a case of partition, means "any time before it is finally disposed of. Until that time it is before the Court, and entirely subject to its control and jurisdiction."

As already stated, at the time when this decree was rendered, there was no statute in New Mexico providing for and regulating partition proceedings. The present law on that subject was not enacted until 1876. The suit begun by the Bent heirs in 1859, and all the proceedings had therein, were necessarily under the general chancery practice and jurisdiction, as administered in the High Court of Chancery in England, unaided by any statute. It was a suit *for partition*, both in name and in purpose. If divested of that feature the whole proceeding must fall to the ground for want of jurisdiction in equity to sustain it.

Reference to the original bill of 1859, and the amendment to it in 1860 (Rec., pp. 46–51), will show that its

allegations and prayers were those of a suit for partition upon an alleged admitted interest. There was no prayer for the establishment of title in complainants. On the contrary, the theory of the bill was that the undivided interest of complainants was confessed by defendants, and that the only controversy was as to the manner of division of the shares.

The moment their title was denied, as it was by the sworn answers of Miranda and Beaubien, the jurisdiction of equity was ousted, because, as this Court has said in *Gay* v. *Parpart*, 106 U. S. 689, "this system does not deal with or decide questions of controverted title."

And, as said by this Court in *McCall* v. *Carpenter*, 18 How. 297, 302—

"The most that the Court would have been justified in doing in the usual course of proceeding would have been to have stayed the suit in partition till the question could have been settled at law. The proceedings in partition are not appropriate for a litigation between parties in respect to the bill."

In any aspect of the case the bill is what the parties themselves made it. No matter what other sort of a bill *might* have been filed, the fact remains that the bill which complainants *did* file, was a partition bill, and nothing else, and the suit must fall within the rules governing the finality of decrees in partition suits.

Our learned adversaries in the Court below contended that the nature of the suit was twofold; and they said of it:

"The bill sought: First, the establishment of the *equitable* rights of complainants in the grant, and *to transform such equitable right into a legal estate by the decree of the Court;* second, after the establishing of their rights, the

partition of the estate among those legally entitled thereto. These matters were in their nature distinct. They could properly have omitted from their bill the prayer for partition."

The purpose of this statement as to the nature of the suit was to lay the foundation for the argument which followed, that it is not to be treated as a partition proceeding at all; and thus to escape the force of the decisions upon the finality of decrees in suits of that character. If by this species of legerdemain they could succeed in transforming the original bill of thirty-eight years ago from what its framers, its opponents, and its judges all understood it to be, into something it was not, it would only bring them into worse difficulties than before. For such a transformation would be an easy matter compared with the one they assume to have been proposed or accomplished by the bill; therein they essay the impossible. There is no known head of Equity Jurisprudence under which such a bill could have been maintained or such relief granted. There was in New Mexico no statute, such as now exists, for quieting the title by establishing the complainant's estate; and there was no proceeding known to equity in which, by force of the decree itself, an equitable right could be "transformed into a legal estate." If anything is settled in the law, both upon principle and authority, it is that in the absence of statutes to that end a decree in equity does not, *ex proprio vigore*, operate on the ownership of land or transfer the title.

Pomeroy states it to be a fundamental doctrine of Equity Jurisprudence that in the absence of statutes,—

"A decree of a court of equity, while declaring the equitable estate, interest, or right of the plaintiff to exist, did not operate by its own intrinsic force to vest the plaintiff

with the legal estate, interest or right to which he was pronounced entitled; it was not itself a legal title, nor could it directly or indirectly transfer the title from the defendant to the plaintiff."

1 Pomeroy's Equity, sec. 428; also 134, 135, 170.
3 *Ibid.*, sec. 1317.

At the last cited place, Pomeroy again declares it to be a "fundamental doctrine of equity" that "a decree was not of itself a legal title, nor did it transfer title to the plaintiff." He then shows how this doctrine has been abrogated by statutory legislation in many States, but that the decrees of the United States Courts are still governed by the ancient rule, and that "their decrees do not transfer title."

In *Hart* v. *Simson*, 110 U. S., on pp. 154, 155, this Court said:

"Generally, if not universally, equity jurisprudence is exercised *in personam*, and not *in rem*. * * * Upon a bill for the removal of a cloud upon title, as a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff."

A court of equity, it further declares,—

"*Has no inherent power, by the mere force of its decree, to annul a deed or to establish a title.*"

But the Bent bill was a bill for partition or it was nothing, and in any possible aspect of it the above-quoted definition by the learned counsel of the scope of the bill, the nature of the title involved, and the relief sought is,

in our opinion, fatal to their whole case. Even if the suit had gone to final decree, it would not have passed the title or established a legal estate. This Court has expressly so decided in—

Gay v. *Parpart*, 106 U. S. 679.

That case involved the consideration of a decree of partition in the State of Illinois, made under the general chancery practice, and before the passage of any statute authorizing the court of chancery to investigate conflicting or controverted titles. There was a provision for partition at law, but the proceeding in chancery remained as if there were no statute. The decision is precisely applicable to the state of the law as it existed in New Mexico when the proceeding in question was had. The Court said:

"The proceeding which we are now to consider declares itself on its face to be in chancery, and the Supreme Court of the State, in reference to this very decree, decides it to be so. *Wadhams* v. *Gay*, 73 Ill. 415. We take it for granted that the State of Illinois, in making this provision and in leaving the parties to proceed by bill in chancery, intended that such a proceeding should have the force and effect of a partition in the High Court of Chancery in England, and in the main conform to the established chancery practice. This system does not deal with or decide questions of controverted title. Its purpose is to make division among the parties before the Court of real estate in which they had interests or estates that were not in controversy as among themselves.

"It is another principle of the chancery jurisdiction *in partition that a decree itself does not transfer or convey title* even after the allotment of the respective shares of each of the parties to the proceeding, but that the *legal title remains as it was before.*

"In this respect a decree is unlike the writ of partition at the common law, which in such cases operates on the

title only by way of estoppel. In chancery, however, this difficulty is remedied by a decree that the parties shall make the necessary conveyances to each other, and they may be compelled to do so by attachment, imprisonment, and other powers of the Court over them in person.

"In many of the States of the Union, where the equity powers of the Courts have been aided by statutes to get rid of the difficulty compelling parties in person to execute conveyances, the Court is authorized to appoint a commissioner to execute the conveyances in the names of the parties. In other cases the statute declares that such a decree itself shall operate as a conveyance of the title.

"At the time that the decree was rendered in the Superior Court of Cook county, which we are considering, we are not aware that any statute existed which gave such effect to the decree of the chancery court in partition (pp. 689–690). * * * That decree, therefore, did no more than to make a division and allotment of the land, *and had no effect upon the actual ownership, or upon the title of the parties*" (p. 692).

Therefore the decree of 1865, if there was any jurisdiction to render it at all, had no other effect than to declare an equitable right in complainants to exist; did not and could not convert such equitable right into a legal estate, but, on the contrary, left the legal title where it was before.

Upon the equitable title alleged—a parol agreement for an interest in land—if it were capable of being established, no partition could be had, and there was no authority to render the interlocutory decree. A bill should have first been filed, and a decree obtained, for a specific performance of the agreement; and after that was done, and a co-tenancy thereby established, a partition might follow. Without it the action was premature.

Williams v. *Wiggand*, 53 Ill. 235, 236.

Unless the action was brought within some of the

recognized heads of equity jurisprudence, or under some special statutory authority, neither the title to the land, nor the right to title, could be determined or established in this way.

A court of equity had no power to decree it, either *in rem* or *in personam*. With the claim of title disputed, as it was here, and unconnected with any other question by reason of which the jurisdiction of equity could attach, the defendants had a constitutional right of trial by jury. The decree of the Court assuming to "establish" the title of the Bent heirs was, therefore, for this reason also, without jurisdiction.

Not only so: Beyond all this, even if the Court should adhere to the principle of its interlocutory decree, and render a final decree of partition upon the commissioners' report, there still remained the right of appeal from such final decree. On such appeal every decision, act and order of the District Court made in the cause would come before the appellate tribunals for review. And upon the record as now presented there cannot be the remotest doubt that the decree would have been instantly reversed, and the bill dismissed, because of the complete absence of title in the complainants, and of jurisdiction of equity to determine it.

The interest or claim of the Bents, therefore, was nothing more than a pending suit for the establishment of an alleged equity, founded upon an unexecuted parol agreement for an interest in land; either without any consideration, or upon an unlawful one. All they had to sell, under the most liberal view of their case, was a doubtful lawsuit. It was a pending and undetermined suit, without any reasonable prospect of ultimate success. But it was a litigation which contained within itself abundant promise of long continued trouble, vexation and expense

for both parties, whatever the final result might be, and was precisely the sort of case toward the compromise of which Courts look with favor.

Such was the claim about which negotiations for compromise now ensued, between Maxwell and the Bent party in the person of Alfred, acting for himself and his two sisters and their husbands. (Rec., p. 62.) They were represented in the litigation by able and eminent counsel. Merrill Ashurst, their leading attorney, was one of the foremost lawyers of his time in New Mexico, as is shown by the reports of cases decided in the Supreme Court. With him were associated Judge Houghton, who was twice a Judge of the Supreme Court of the Territory, and Judge Tompkins, also a prominent member of the New Mexico bar, and a frequent practitioner before the Supreme Court. In the first volume of the New Mexico reports it appears that out of 43 cases heard and decided by the Supreme Court from 1852 to 1869, Ashurst was counsel in 31, and Tompkins in 15; and that in 1859, Tompkins was Attorney-General of the Territory.

It appears in evidence that all the subsequent proceedings on the part of the complainants in this case were taken on the advice of their counsel.

What followed on this subject is best told by quoting from the statement of facts (Rec., p. 62):

"It was understood between Alfred Bent and Sheurick, with the consent of their wives and Mrs. Hicklin, that either Alfred Bent or Sheurick, or both of them, should act in the matter as agents to sell to Maxwell, if they could, their interests in the grant for the best price they could get, but never less than $21,000, or what Beaubien's heirs got. Overtures for compromise were made by Alfred Bent, acting for himself and his co-complainants, his two sisters, and their husbands, in September or October, 1865, when he went to Maxwell's residence at Cimarron, to try and

make a sale of their interest. These were made with the approval of Judge Houghton, one of their counsel, whom Bent consulted about it, and who told Bent he had better settle for himself and the other heirs by compromise rather than to take the award of the Commissioners. Bent demanded $21,000; Maxwell offered $18,000. Bent returned to Taos, where his family resided, without having affected a definite agreement with Maxwell as to price. The Bents considered the sale as good as made, but Alfred Bent said to his co-complainants that they could get a few thousand more by being quiet a few days, insisting, however, on having as much as the Beaubien heirs got; they then expected to close the bargain in a few days; were ready to make the deeds as soon as the matter was settled, and the deeds had already been written out by Sheurich, husband of Teresina Bent."

But business moved slowly in those days, and before anything further was done in the matter, Alfred Bent died in December, 1865. He left surviving him his widow, Guadalupe Bent, who afterwards married George W. Thompson, and is known in this record as Guadalupe Thompson, and three minor children, Charles, Julian, and Alberto Silas. (Rec., p. 62.)

Beaubien had died pending the litigation, leaving six children, who inherited his interest, and were found by the decree of 1865 to be the owners of the undivided half of three-fourths of the grant. (Rec., pp. 59, 61, 62.)

"Beaubien had left six children; Maxwell married one of them, and purchased the interest of the other five for a consideration of not more than $3,500 each, at the following dates: Juana and her husband, Joseph Clouthier, and Isadora and her husband, Frederick Muller, April 4, 1864; Eleanor and her husband, Vidal Trujillo, July 20, 1864; Petra and her husband, Jesus G. Abreu, February 1, 1867; Paul Beaubien, January 1, 1870. Muller and Clouthier were merchants, residing at Taos; Trujillo and Abreu were

farmers, stockraisers, and also had stores; all four of them, as well as Sheurich and Hicklin, the husbands of Alfred Bent's two sisters, were intelligent men, ranked among the best citizens in their community, and were considered men of wealth and influence. (Findings, Rec., p. 68.)

"At the April term, 1866, of the District Court for Taos county, and on the ninth day of that month, the death of Alfred Bent was suggested by counsel for complainants in the then pending suit, and, on their motion, his three infant children, Charles Bent, Julien Bent, and Alberto Silas Bent, were made parties complainant." (Findings, Rec., pp. 68 and 69.)

The complainants in this suit then were Estefana and Teresina, both adults and married, together with their husbands, Hicklin and Scheurich, and the three minor children of Alfred Bent, for whom, on April 11, 1866, their mother, Guadalupe Bent, was, on motion of solicitors for complainants, appointed guardian *ad litem* "with full power to execute deeds, or to carry into execution all sales of transfers made of their interest, etc., to Maxwell." (Rec., p. 69.)

"In the meantime the negotiations for compromise, which had been interrupted by the death of Alfred Bent, were resumed, the Bent heirs being now represented by Aloys Scheurich, husband of Teresina, one of the adult complainants, who acted in said negotiations on behalf of his wife, Estefana, and her husband, Hicklin, and Guadalupe Bent. A settlement with Maxwell was concluded by Aloys Scheurich, acting for his wife, Mrs. Hicklin, and her husband and Guadalupe Bent as guardian *ad litem* for Alfred's children, which was acceptable to said parties, by which Maxwell was to pay the sum of $18,000 for the conveyance of the interest or claim of the Bent heirs. The compromise was advised by Merrill Ashurst, the leading counsel for the Bent heirs, the grounds of his advice not being stated. It was accepted and carried out by

the adult complainants, Teresina and Estefana and their husbands, Scheurich and Hicklin." (Findings, Rec., pp. 69, 70.)

The only difference between this settlement and the one offered and authorized by Alfred Bent was that the amount to be received was fixed at $18,000, instead of $21,000. But this difference was more apparent than real. The point with Alfred and his co-complainants at first had been that they must get as much as Beaubien's heirs; and it is evident that the sum of $18,000 offered by Maxwell was afterwards accepted, on finding that Beaubien's heirs actually received less, each of them getting $3,500 for one-sixteenth, while the Bent heirs were each to get $6,000 for one-twelfth. If the Bents had been paid for their doubtful claim in the same proportion that the Beaubiens were for their undisputed interest, they would have received for their entire claim only $14,000, instead of $18,000. The settlement executed was therefore clearly within the lines contended for by Alfred in his lifetime. Let it be remembered, also, that the settlement was not sought by Maxwell, who proposed to fight the case to the end, but was made upon the solicitation of the Bent party, urged both before and after the death of Alfred.

This compromise was advised by Ashurst, the leading counsel for the Bents (Rec., p. 70), who knew better than any one else the impossibility of sustaining the decree of June, 1865, on appeal. It was accepted and carried out by the adult complainants, Teresina and Estefana, and their husbands, who on May 3d and 31st, 1866, executed deeds conveying to Maxwell their interests, each for $6,000. (Rec., pp. 72–3.) And from that day to this, no complaint of imposition, unfairness or fraud has ever been made by them. On the same day, Guadalupe Bent, guardian *ad litem* for her three children, executed a simi-

lar deed to Maxwell, conveying their interests for $6,000, with full covenants of warranty by the said Guadalupe. (Rec., pp. 70–72.) This deed recited the order of the Court on April 14, authorizing it.

At the September term, 1866, next ensuing, a decree was entered in the cause, which had evidently been prepared and signed for the April term, but for some reason had not been entered. (Rec., p. 73.) It recited that "a mutual agreement had been made between the parties to the cause, settling and determining the equities," and directed the conveyances to be made, which had actually been already done in May; thus being in effect, though not in words, a confirmation of those acts. This decree, however, was of far more importance in another particular. It recited that an "interlocutory decree was rendered at a former term of the Court in said case, decreeing one-fourth of the land to the complainants, and appointing commissioners to divide and set it apart;" that "said interlocutory decree was never carried into effect;" and it was therefore *ordered, adjudged*, and *decreed "that the said interlocutory decree above mentioned" be set aside;* and it ordered each party to pay its own costs.

Thus the Court, in the exercise of its undoubted power and control over all interlocutory orders and decrees during the pendency of the cause, extinguished the decree upon which our opponents rely for the evidence of absolute legal title in the heirs of Bent.

The compromise under which this was done is assailed in the bill of complaint in the case at bar, as having been procured by fraud, deception, threats, and imposition, practised by a man of great power and influence upon an ignorant and feeble woman. These charges are completely swept away by the proofs as stated in the findings of fact by the lower Court, which will be referred to hereafter.

This transaction, moreover, has been once under the consideration of this Honorable Court, in a case of which more will be said hereafter; and the view which the Court then took of it will be found to be the only one which can be taken in the light of the proofs now in the Record. The court said, in *Thompson* v. *Maxwell*, 95 U. S. 391:

"The proofs show a case which supports the conclusions of the decree to the effect that the terms of compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent), were advantageous to the said infants, and were so considered and accepted by the Court in their behalf."

As I have said before, the decree by which this compromise was carried into execution was twofold in its character. The original decree as signed is not preserved in the record, nor does the decree entered bear any date, other than the record of the day on which the entry was made. Therefore we do not know the date on which it was actually signed by the Judge, although the inherent probability is that it was signed about the close of the April term, but not entered until the September term. It is a matter of no importance, however, and I only allude to it as affording a probable explanation of the curious fact that the decree directs conveyances to be made by the Bent heirs—not only by the guardian of the minors, but also by the two adult parties—when this had, in fact, already been done according to the exact terms of the decree. It is argued that this direction, in so far as it affected the property of the minor children of Alfred Bent, was void, because the Court had no authority by statute to direct the conveyance of the estate of infants. Were such the law, however, for the

purpose of this case, it would be an entirely immaterial matter. Whether the conveyance, or the order directing it, was void or valid, does not affect the other and more important part of the decree of September, 1866, viz., that which vacated and set aside the interlocutory decree of 1865, which no Court has ever denied the power to do. The two things were separate and distinct, and might have been in two different decrees. In one part, this decree found that there had been a compromise, and it vacated the former decree. In another part, it undertook to make the terms of that compromise more effectual, by directing further acts of the parties themselves to carry it into execution. But the first could stand independent of the last. Upon the authorities I have already cited, there is no escape from the conclusion that the District Court had the power to vacate the interlocutory decree of June, 1865; and that the decree of September, 1865, was, to this extent at least, lawful and valid. The interlocutory decree was thereby extinguished, and to every legal intendment expunged, blotted out of existence, and made absolutely null and void; and with it fell all rights or claims of whatever nature that depended on its findings.

Suppose the decree of 1866 had gone no farther; what would have been the status of the case, and of the parties? Undoubtedly they would have been just where they were before the interlocutory decree of June, 1865, was made. The case would have stood for hearing again, upon pleading and proofs. If, in addition to vacating the former interlocutory decree, the Court had also entered a judgment dismissing the bill for want of title in the complainants, the claims of the Bent heirs, infants included, would have been totally extinguished, and the property in controversy would have thereby become vested in Maxwell just as completely as it could have been by conveyance.

No authority can be found to controvert the power and jurisdiction of the Court to do this. And this Court, in speaking of this very decree of September, 1866, has said:

"A decree for carrying out a settlement and compromise of a suit is certainly not of itself erroneous. When made by consent, it is presumed to be made in view of existing facts, and that these were in the knowledge of the parties. *In the absence of fraud in obtaining it, such a decree cannot be impeached.*"

Thompson v. *Maxwell*, 95 U. S. 400.

This, then, was the situation in September, 1866. The litigation was closed. Each party paid its own costs. Everybody acquiesced in the result. Estefana and Teresina and their husbands were satisfied. Guadalupe Bent married George W. Thompson not later than March, 1867, and went with her children to reside at Trinidad, Colorado. And it remains for me to explain how and why it is that the Courts are not being vexed with controversy over those dead and buried issues.

In April, 1870, Maxwell sold and conveyed the entire grant to The Maxwell Land Grant and Railway Company for a consideration of $1,350,000. (Rec., p. 12; and in No. 90, pp. 20, 66, and 77.) Afterwards distinguished counsel from New York, who examined the title for the purchasers, for what no doubt seemed sufficient reasons to him, was not satisfied with the state of the record touching the one-twelfth interest purporting to have been conveyed by Guadalupe Bent, and he succeeded in convincing the parties interested of the desirability of employing him to clear up the doubts which he had excited. He conceived the theory that inasmuch as the decree of June, 1865, had been vacated by the decree of September, 1866, the Bent claim had been extinguished, and therefore Guadalupe Bent's conveyance did not convey anything.

It seemed to him an anomaly that there should be a conveyance without something to convey, and, in order that there might appear some excuse for the existence of Guadalupe's deed, he proposed to have the decree of 1866 reversed in so far as it set aside the former decree, and then to have a new decree carrying into effect the compromise agreement and quieting the title. For this purpose he filed a bill of review in August, 1870. In so doing he opened Pandora's box and let loose the winds of litigation, which have raged with fitful energy for twenty-seven years. Mr. Thompson, the enterprising husband of Guadalupe Bent, shrewdly concluded that if there was something in this matter requiring the Maxwell party to go into Court for, that something must be worth fighting. So he employed counsel and entered upon a vigorous defense. They interposed a demurrer, and when this was overruled answered the bill, setting up that the conveyance by Guadalupe and other proceedings in 1866 were illegal and void, and did not divest the title of the infants. (Rec. in No. 90, p. 39.)

It is a remarkable and significant fact, however, that in the answers that were then made by Guadalupe Thompson and her husband, at the time when the whole transaction was fresh in their memory, there is not a single suggestion of any imposition or fraud in the compromise agreement, or decree, although the invalidity of the decree, and the proceedings connected therewith, as affecting the right or title of the infants, was distinctly and repeatedly alleged.

The case in this form proceeded to a decree by the District Court, which found that—

"Pending the original suit, and after the death of Alfred Bent, an agreement by way of compromise was

made by the adult parties thereto, for the settlement of the same; and that the terms of said compromise and agreement were considered advantageous to the said infants, and were accepted by the Court for and on their behalf, as is evidenced by the decree attempting to carry into full effect the terms of said compromise." And that "By reason of said agreement and compromise all the equitable right, title, interest, and claim of the said infants in and to the premises in question became and was wholly terminated and extinguished."

It therefore ordered and decreed that the decree of 1866 should be vacated and set aside, and—

"That the said premises be and they are now held and possessed by The Maxwell Land Grant and Railway Company, free and discharged of any and all trusts, right, title or interest in or to the same, in favor of or pertaining to the said Guadalupe Thompson, either in her own right or as administratrix of the estate of said Alfred Bent, the said George Thompson, her husband, the said Charles Bent, Alberto Silas Bent, and Julien Bent, or any or either of them." (Rec. in No. 90, p. 52.)

This decree was affirmed by the Supreme Court of New Mexico:

Thompson v. *Maxwell*, 1 N. M. 603.

It was reversed by this Honorable Court:

Thompson v. *Maxwell*, 95 U. S. 391.

But upon an examination of the opinion in the latter case it will be perceived that although the decision therein was in form a reversal, nevertheless such reversal was made upon a technical matter of pleading, while upon the merits of the case it fully sustained the conclusions of the Court below. The trouble which the Court found with the case was that upon the established principles of

equity pleading the bill could not be sustained as a bill of review. But it held that if the bill had been stripped of the allegations and prayers which made it a bill of review, and had been limited to its apparent purpose of carrying into effect the compromise agreement and quieting the title, it would have been free from legal objection. It also held that while it was not established that the compromise on which the decree of September, 1866, was founded was made by Alfred Bent in his lifetime, yet negotiations to that end were commenced by Alfred Bent, and concluded after his death by the other parties to the suit. And it concluded thus:

"*The proofs show a case which supports the conclusions of the decree, to the effect that the terms of compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent) were advantageous to the said infants, and were so considered and accepted by the Court in their behalf.*" (P. 400.)

But although the Court found it necessary to remand the case for further proceedings, in conformity with its opinion, it did not think proper that the case should be litigated over again; and it therefore directed that the complainants have leave to amend their bill, with liberty to the defendants to answer any new matter introduced therein, and that all the proofs should stand as proofs upon a future hearing, with liberty to either party to take additional proofs upon any new matter put in issue by the amended pleadings.

This direction furnished a clear and infallible guide to all Courts below as to the subsequent conduct of the case, and nothing can be more certain than that this Court decided that the complainants were entitled to the relief they were evidently in search of, if they would simply frame their bill in accordance with the intimations of its opinion.

The complainants accordingly amended their bill by elimination instead of addition, so that it is no longer a bill of review, but a bill to quiet title; and the allegation of the compromise agreement is made more general by striking out the statement that it was made in the lifetime of Alfred Bent.

Upon these amendments being made, the defendants insisted that they had a right to interpose a new and original defense to the whole bill, by setting up fraud in the procurement of the decree of September, 1866, and the compromise on which it was founded. Upon exceptions being filed to their answer, the District Court directed all of this new matter which was not strictly responsive to the new allegations of the amended bill to be stricken out. The case again proceeded to a hearing and decree, in accordance with the prayer of the bill. That decree was reversed by the Supreme Court of New Mexico, on the ground that the District Court erred in sustaining the exceptions to the new matter in defendants' answer; and the case was remanded with directions to restore those portions of the answer which had been stricken out.

Thompson v. *Maxwell*, 3 N. M. (Gild.) 448.

This was accordingly done. Issue was joined, and a large amount of proof taken by defendants in the attempt to sustain their allegations of fraud and imposition. This was met by additional proofs on the part of the complainants, and upon this record this case went to final hearing, resulting in a third decree in favor of complainants, which, after being affirmed by the Territorial Supreme Court, is now appealed from, as Case No. 90, now standing for hearing along with this.

In the meantime, after that case was remanded by this Court, an original bill was filed in behalf of the Bent children, not only against the complainants in the then pending suit, but also against The Maxwell Land Grant Company, which had meantime acquired the property by purchase, to impeach the decree of September, 1866, for fraud, upon the same grounds alleged in the new answer in the original suit; praying that it be set aside, and that the decree of June, 1865, be re-established and carried into effect. This bill also attacked the decree of September, 1866, for error, in that the District Court had not the power to direct the disposal of the infants' real estate, and prayed in the language of a bill of review that it be reversed and held for naught.

To this bill a demurrer was interposed, which was sustained, and the bill dismissed. But upon appeal that decision was reversed by the Supreme Court of New Mexico, upon the ground that the fraud charged in the bill, which was admitted by the demurrer, was sufficient to sustain an action to impeach the decree of 1866.

Bent v. *Maxwell*, 3 N. M. (Gild.) 227.

The new case upon the original bill of the Bent children being thus remanded, the defendants answered the bill, and the parties proceeded to take proofs in order; and the two cases have since proceeded side by side. By stipulation, all the proofs in either case were to stand as proofs in both. (Rec., p. 41.) Upon final hearing this new bill of the Bent heirs was dismissed, and from the affirmance of that judgment by the Territorial Supreme Court the case is brought here by appeal. Thus we have now two cases for hearing together, viz: No. 90, in which the Maxwell people are complainants, and No. 91, in which the Bent people are complainants. Both involve almost

the same questions, and depend upon the same findings of facts by the Supreme Court of New Mexico. A decision in favor of complainants in No. 90 necessarily resulted in the dismissal of the bill in No. 91. Therefore, the argument in No. 91 is applicable equally to No. 90 for the most part, and *vice versa*.

ARGUMENT AGAINST THE RIGHT TO REVERSE OR IMPEACH THE DECREE OF SEPTEMER, 1866.

The object of the bill in this case is to have the decree in the May term, 1865, purporting to establish the right of the Bent heirs to one-fourth of the grant, and directing partition thereof, enforced and carried into execution (Prayer of bill, Rec. 14). As this is impossible so long as the decree of September, 1866, vacating the former interlocutory decree, stands, the bill necessarily undertakes to get rid of that decree. Unless this can be done, complainants' whole case falls to the ground at the outset; but even if it were done, their case would fail just as completely for other reasons.

The attack upon the decree of 1866 is upon two grounds, viz.:

I. That it was erroneous, because entered by consent, and because the District Court was without jurisdiction to direct the disposal of infants' real estate.

II. That it was procured by fraud.

Under the first of these propositions, the attempt is to reverse and annul the decree for error, upon the allegations and prayers of a bill of review (Rec., pp. 10, 15); under the second, to impeach it for fraud. In view of the facts now shown in the record by the findings of the Court below, we contend that the case is *res adjudicata*.

I.

The Case is Res Adjudicata.

When the case of *Thompson* v. *Maxwell* was before this Court, in 95 U. S., the Court had before it on the record the same proceedings of the District Court of Taos County in 1866 that are attacked now, viz.:

1. The order appointing Guadalupe Bent guardian *ad litem*, with authority to execute the conveyance to Maxwell.
2. Her deed, executed upon the authority of that order.
3. The decree of September, 1866.

This Court also found, as a fact established by the proofs, that:

4. The foregoing proceedings were had in pursuance of an agreement for compromise, the negotiations for which were commenced by Alfred Bent in his lifetime, and concluded after his death by Scheurick, and acquiesced in by the other parties, including the widow of Alfred Bent, acting in behalf of her children.

Which fact remains unchanged in the present record.

The validity of the compromise, the decree, and the deed, as affecting the title of the minors, was distinctly put in issue by the pleadings. Had they been invalid, the title of the infants, whatever it might be, would not have been divested, but would have remained as it was before those proceedings were had. This Court, upon that aspect of the case, must necessarily have denied the relief sought in any form, and dismissed the bill.

By not dismissing the bill, by holding that the decree could not be impeached except for fraud, and that the

proofs show a case which supported the conclusions of the decree then appealed from, and by remanding the case simply for an amendment of the pleadings, this Court has passed upon the rights of the parties growing out of those proceedings, and their status has been fixed as the law of this case. Those questions are all antecedent to the mandate, are concluded by it, and are not re-examinable.

It is settled by repeated adjudications of this Court that—

"Whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit."

Roberts v. *Cooper*, 20 How. 481.
Supervisors v. *Kennicott*, 94 U. S. 498.
United States v. *Pacific Mail Co.*, 104 U. S. 480.
Clark v. *Keith*, 106 U. S. 464.
Chaffin v. *Taylor*, 116 U. S. 572.

See also—

Stockton v. *Ford*, 18 How. 418;
Nashville Ry. Co. v. *United States*, 113 U. S. 261,

which present examples of attempts to relitigate in a second suit questions previously decided in a former suit, and where the Court held that the question was properly involved in the former case, and might have been there raised and determined, and could not be brought in issue again.

In the case of *Southern Pacific R.R. Co.* v. *United States*, decided by this Court at the present term—No. 71—the Court, upon an exhaustive review of the authorities, has said that as a general principle—

"A right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies."

The only new element introduced into the case since the decision in 95 U. S. is that of fraud. The case upon the present record will otherwise present the same state of facts as then, viz.: a consent decree, carrying out a compromise begun by Alfred Bent, and concluded after his death by the other adult complainants and Guadalupe Bent, as guardian of his children. Upon that state of facts, and with this identical decree before it for consideration, this Court held upon the former decision of the other branch of this case in 95 U. S., that this decree cannot be set aside on a bill of review. And on page 398, as if to anticipate and settle in advance the question raised by this bill, the Court goes on further to say, speaking of this identical decree:

"*A decree for carrying out a settlement and compromise of a suit is certainly not, of itself, erroneous. When made by consent, it is presumed to be made in view of the existing facts, and that these were within the knowledge of the parties. In the absence of fraud in obtaining it, such a decree cannot be impeached.*"

It is, therefore, the *law of this case*, and no longer open to controversy or discussion, that the cause of action stated by this bill is insufficient, except on the single ground of fraud.

Hence, everything under the first head is eliminated by the previous decision of this Court.

Everything under the second is eliminated by the statement of facts by the Court below, which declares as the result of all the evidence in the case that—

"No fraud, imposition, or error has been shown to have entered into said transaction, or to have brought about said compromise decree." (Rec., p. 76.)

It is, therefore, as if the bill had been framed without any allegation of fraud; which would have left it a bill of review, pure and simple, to reverse for error a decree which this Court has said cannot be impeached, except for fraud.

If this is not conclusive of every question raised by the present bill, we are unable to conceive how anything could be In discussing the propositions of our opponents further, I do so believing that the questions proposed are not within the record. It is only from a sense of the duty of counsel to leave nothing undone which might by any possibility tend to the benefit of those whom he represents, and for the further reason that any argument advanced by counsel so learned and distinguished is worthy of respectful consideration, that I venture to discuss them at all.

II.

There was no Error in the Decree of 1866.

The principal allegation of error relied upon to reverse the decree of 1866 is founded upon the proposition that the courts of chancery, in the absence of statutes authorizing it, have no power to order a sale of infants' legal estate in lands, for maintenance, education, or investment. This is laid down in 3 Pomeroy's Equity, sec. 1309, as a rule upon which the authorities are far from uniform; and he cites in a note the following cases to the contrary of the doctrine stated in the text:

Goodman v. *Winter*, 65 Ala. 434.

Sharp v. *Findley*, 59 Ga. 722.
Bulow v. *White*, 3 South Car. 371.
Huger v. *Huger*, 3 Dessaure (S. C.), 18.

To which may be added the following later cases:
Thorington v. *Thorington*, 82 Ala. 489.
Gassenheimer v. *Gassenheimer*, 108 Ala. 651.

In Perry on Trusts, sec. 610, it is said to be "a matter of doubt and much conflict of opinion."

See also—
In re Salisbury, 3 Johns. Chy. 348.
Hedge v. *Rickers*, 5 Johns. Chy. 167.
Bulow v. *Buckner*, Rich. Eq. Cas. (S. C.) 401.
Donning v. *Sprecher*, 35 Md. 474.
Stapleton v. *Vanderbilt*, 3 Dessaure (S. C.) 22.
Kearn v. *Venja*, 50 Mo. 410, 434.

But taking it as stated, the rule is distinctly limited to sales of *legal estates* of infants, for purposes of maintenance, etc., in a direct proceeding for that purpose.

It does not apply to equitable estates.
Wood v. *Mather*, 38 Barb. 473.
Cochran v. *Van Surley*, 20 Wend. 376.
Mills v. *Dennis*, 3 Johns. Chy. 367.
Anderson v. *Mather*, 44 N. Y. 260.

Nor to cases where the infants are parties litigant, and their interests are before the Court in adversary proceedings.

Corker v. *Jones*, 110 U. S. 317,—a case entirely in point.

In the last cited case, where the infant was plaintiff, and the Court had decreed that certain land purchased by defendant as guardian should be held by him individually,

and the interest of the ward divested, it was urged that the court of chancery was without power to render such decree, upon the same grounds insisted on here. The Court said:

"The question is not one relating to the sale or disposition of any part of the ward's estate which had come under the control of the guardian, but was whether, under the circumstances, the purchase made by the guardian should be treated as made for the benefit of his ward, or whether its burdens and risk should be borne by him individually. It was peculiarly a case for cognizance in equity, and the Superior Court of Burk county, we think, had jurisdiction to make the decree directing the title to remain in Malcolm D. Jones for his own use.

"It is further urged, however, that the decree is voidable because it was taken against an infant, without the protection of a *guardian ad litem*. If the infant had been defendant, the objection could only be taken on appeal, or by bill of review, and not collaterally; but the infant was plaintiff, and sued by his next friend, which was proper, and there is no more ground for saying that the decree was against the infant than in his favor."

The distinction is evident, upon a moment's reflection. For the jurisdiction of chancery courts to decree transfers of infants' estates is constantly exercised in such matters as suits for specific performance of contracts of the ancestor, and in partition of real estate. They are among the best known heads of equity jurisdiction.

In partition, the jurisdiction has existed in courts of chancery from the earliest times, to effect transfers of real estate of infants, whether plaintiffs or defendants. It extends to a sale of the property as well as to a division.

Freeman on Cot. & Par., secs. 457, 467.

Brook v. *Hertford*, 2 P. Wms. 518.

Hooke v. *Hooke*, 6 La. 474.

Coker v. *Pitts*, 37 Ala. 693.

This is emphasized by Pomeroy in the most positive terms:

"By the original equitable jurisdiction, independent of any statute, if all the parties *sui juris* were willing, the Court had power to decree a sale, and this even though infants might be among the parties interested."

3 Pom. Eq., sec. 1390; citing:
Davis v. *Turney*, 32 Beav. 554.
Hubbard v. *Hubbard*, 3 Hem. & M. 38.
Thackery v. *Parker*, 1 N. R. 567.
Rivers v. *Duer*, 46 Ala. 418.
Goodman v. *Winter*, 64 Ala. 410.

The fallacy of the entire agreement of appellants as to the effect of the decree of 1866 lies in their attempt to treat it as if made in a direct proceeding for the disposal of the real estate of infants. If this were the case, many of the authorities cited by them would be applicable, because it is not contended by us that the landed estate of infants can be disposed of this way upon consent alone.

But consent will not of itself vitiate a proceeding by a Court of competent jurisdiction simply because the interests of infants are in part involved, if the transaction appears free from collusion or fraud; especially where there are other parties *sui juris*, and kinsmen with identical interests as well, whose interests are dealt with on the same terms. Still less do these objections apply to a proceeding which was not in any sense one for the disposal of the estate of infants, but a compromise of a litigation, made with the sanction of the Court.

That the claim of the Bent heirs, whether before or after the interlocutory decree of 1865, if it was anything at all, was nothing but a mere equity, has been sufficiently demonstrated by discussion of its character in the intro-

ductory part of this brief. This Court, in 95 U. S., called it an equitable claim ; and the District Court, for want of the necessary statutory power, could not, by any decree alone, change it into a legal estate. Still less could it do so by a decree which was not final, but was still subject to review upon appeal.

The importance of the proposition of our opponents now under consideration lies in the fact that if true, it destroys the efficacy of the deed of Guadalupe Bent, conveying one-twelfth interest in the grant to Maxwell. If that conveyance was of a legal estate, and depended for its authority solely upon the direction of the District Court, and the District Court was without power to direct it, then, as a matter of course, the deed would convey no title. But if it should appear that the interest of the children of Alfred Bent—after the decree of June, 1865, and giving to it all the force claimed by counsel—was nevertheless only a trust estate and not a legal title, and that Guadalupe Bent was from another source invested with ample authority to sell and convey it, either in her discretion or by the direction of the District Court, then, of course, the question of the power of the District Court to decree a conveyance of their legal estate is no longer material. Such is the case now.

Will of Alfred Bent.

The conveyance in question is found on page 70 of the Record. It recites the appointment of Guadalupe Bent as guardian *ad litem* of the minor heirs of Alfred Bent. It is signed, "Guadalupe Bent, *nee* Long, guardian *ad litem* of Charles Bent, Julian Bent, and Alberto Silas Bent," and is acknowledged by her personally. It recites the payment to her by Maxwell of $6,000, and acknowledges

the receipt thereof, and then grants, bargains, sells, conveys, and confirms to Maxwell "the following described real estate, situate," etc. (here follows a description of the whole grant), "to have and hold the one undivided one-twelfth interest of, in, and to the above described real estate," etc., "the said one-twelfth undivided interest being the entire interest, estate, claim, and demand of the said Charles, Julian, and Alberto Silas Bent, the said minor heirs of their father, Alfred Bent." Then follows an absolute covenant of warranty that the above-described interest is free and clear of encumbrances, and that "*I, my heirs, executors*, and administrators shall and will *warrant and defend* the title to the same unto the said Lucien B. Maxwell, his heirs and assigns, against the lawful claims or demands of all persons whomsoever."

It is the law that where a deed with covenants of warranty is executed by a person as executor, or in other similar capacity, the word "executor" may be taken as only *descriptio personae*, and the deed will be good if such party has power in his own right to make it.

Norris v. *Harris*, 15 Calif. 255.
Taylor v. *Davis*, 110 U. S. 336.

And where there are full covenants of warranty, such as there are here, the deed will convey all the title which the grantor had in her own right, whether then existing or afterwards acquired, notwithstanding she assumed to convey in a fiduciary capacity.

Rawle on Covenants, secs. 35, 36, 247.
17 Am. Dec. 224, note.
Heard v. *Hall*, 16 Pick. 460.
Foster v. *Young*, 35 Iowa, 32.

The last case is precisely in point, and on all fours with this one; and it was held, after a review of the authorities,

to be the law beyond question, that a deed by a guardian, purporting to convey real estate belonging to his ward, if made with covenants of warranty, binds the guardian as to any individual interest he may have and possess in the title thereto.

The application of the foregoing is this :

After the original case had been remanded to the Territorial Courts, and this new suit had been commenced, the defendants put in evidence the will of Alfred Bent, presented to the Probate Court April 12, 1866, by Guadalupe Bent herself, and duly proved, admitted to probate and recorded, as shown by the records of the Probate Court of Taos county, by which Alfred Bent *gave to the said Guadalupe*, for the maintenance of herself and his three children, *all his real and personal property*, and appointed her as his executrix.) (Rec., p. 65.)

The introduction of this document carried consternation into the camp of our learned adversaries. Proceedings in the main litigation were suspended until they had exhausted every means—even to the extent of an appeal to this Court—in the effort to get rid of it.

They first attacked the probate of the will, and procured a judgment of the Probate Court of Taos county setting aside the probate made in 1867, and declaring it not the will of Alfred Bent.

The District Court reversed the action of the Probate Court, and declared the will and the probate thereof to be valid and effectual. Our opponents appealed to the Supreme Court of the Territory without avail ; and then to this Court, where they were again defeated, and the will of Alfred Bent was established as a muniment of title forever.

Bent v. *Thompson*, 5 N. M. 508.
Ibid., 138 U. S. 114.

That this will invested Mrs. Bent with the legal title to the real estate, subject to a trust, there can be no doubt. The cardinal rule in the interpretation and construction of wills is, that the intention of the testator is to govern, if it can be ascertained from the instrument. Here was no attempt by Alfred Bent to disinherit his children; but on the contrary the intention to provide for their maintenance is distinctly expressed. For the purpose of carrying this into effect, the property is given to the widow, subject to a trust for the maintenance of the children along with herself. This trust necessarily implies the power of disposition in the trustee to make it effectual. The testator clearly conferred this power when he gave the property to *her*, instead of to her and the children. It was such a trust as a court of equity would enforce, supervise or control, upon a showing that the widow was not administering it properly or in good faith. For the purpose of maintaining herself or the children, she could alienate the property, either directly or by the order of the court of chancery. One thing is certain: the fee was *not* in the children. The best that can be said for them is, that they were *cestuis qui trust* as to the portion they would have inherited in the absence of a will.

The case of *Dunscomb* v. *Holst*, 13 Feb. Rep. 11, cited by counsel, and also those referred to in the opinion in that case, are all different from this. In those cases the gift was "for the use," or "use and support" of the widow and children. In the case reported, the decision of the Court simply was that under such a will the title acquired by the widow was not of such clear and undisputable character as a purchaser at a Master's sale had a right to demand.

In *Bowers* v. *Bowers*, 4 Heisk. 293, cited in 13 Fed. Rep. 13, the Court held under a similar will that—

"The legal title was vested in the daughter (devisee), but she was to hold it as trustee for the joint use and benefit of herself and her children. The daughter, therefore, had the *legal title* to the whole property, and an equal equitable interest therein with each of her children."

In some of the other cases cited from Tennessee it was held that the words of the will created a life-estate only in the devisee. There is a technical force to the word "use," which gave rise to the construction of the will in the latter class of cases.

In our case, however, the word "use" is not employed, but "maintenance" is. And this word implies the power to employ the property for such purpose—to produce something wherewith to maintain. It therefore necessarily implies the power to convert land into money.

In *Woods* v. *Woods*, 1 Myl. and Craig, 401, it was held by the English Court of Chancery that "where a man willed his property to his wife toward the support of herself and her family" she took the property subject to a trust for the family.

In *Crockett* v. *Crockett*, 2 Phill. 533, the will said:

"All the property shall be at the disposal of my wife for herself and children;" and the Chancellor, Lord Cottenham, held that as between her and the children the widow "was either a trustee of the fund, with a large discretion as to the application of it, or she had a power in favor of the children subject to a life interest in herself."

In *McGowan* v. *McGowan*, 2 Duer (N. Y.), 57, the language of the will was:

"I give and bequeath to my wife Anne all my real and personal estate whatsoever * * * for her own behoof, and the maintenance of my children, etc. * * * and at my son J.'s becoming of age the whole estate to be

divided equally among my children." (Naming seven in all.) Held under this: "The widow in this case took the whole estate subject to the maintenance and education of the children as a charge, which a court of equity might enforce."

And it was further held that there was no suspense of the power of alienation, except by the provision in the will that the property should be divided between the children on J.'s attaining his majority, which it was held suspended such power during the minority of the youngest child.

Even under the authority of *Bowers* v. *Bowers*, *supra*, cited in 13 Fed. Rep. 13, it was distinctly held by the Supreme Court of Tennessee that the *legal title vested in* the devisee, and an equitable interest vested in the children.

In *Pratt* v. *Miller*, 23 Neb. 496, where the property was given by will to the testator's wife "for the maintenance and support of my said wife and my infant child, C. D. P." It was held that the will gave the legal title to the widow upon trust, and that the child was the equitable owner, and on the death of the widow entitled to a conveyance of the legal title to him.

In *O'Reilly* v. *McKiernan*, 90 Ky. 116, the will gave the property to the wife, "to be administered by her for the support of herself and my children;" and the Court held that under it—

"The legal estate or title is in the wife; at the same time it must be regarded as being held in trust for the benefit of herself and children," and that "the aid of the Chancellor must be invoked if a sale is required."

See also, generally:

Perry on Trusts, sec. 117.

Now if, as these authorities seem to establish, the widow under Alfred Bent's will took the legal estate in the property, subject to a trust in favor of his three children, then the interest of the said children was precisely the sort of interest over which courts of chancery have *always* had jurisdiction in case of infants, viz., *their trust estates.*

This is clearly set forth in a learned opinion by the Supreme Court of New York, in the case of *Woods* v. *Mather*, 38 Barb. 473.

That case was decided in 1862. The Court approves the decision of Chancellor Kent in *Mills* v. *Dennis*, 3 Johns Chy. 367, that—

"Courts of equity still have the power which they have long exercised, of changing the estates of infants from real into personal and from personal to real, whenever they deem such a proceeding most beneficial to the infant."

And the Court further proceeds:

"The court of chancery had inherent jurisdiction, independent of statutes, to order a sale of the equitable interests of infant plaintiffs. It is a settled principle that whenever the property of infants consists of real or personal estate, the title to which is in trustees, the Chancellor, as the general guardian and protector of the rights of infants, may authorize such a disposition thereof as he, in the exercise of a sound legal discretion, may deem most beneficial to such infant." (P. 482.)

After alluding to the New York statutes on the subject, the Court proceeds further:

"The statutes above referred to give the court of chancery power over infants' legal estate only. But the power is ample, and it would be a remarkable anomaly,

if the Court had not also a jurisdiction at least equally extensive in respect to infants' equitable estates, which by their very nature are under its peculiar and exclusive care. There are remarks to be found in some of the reports to the effect that the power of the Court is derived wholly from statutes; but so far as I have observed they occur in cases involving sales of legal estates, and should be understood as referring to such estates only. This question and some others discussed in this case have been set at rest by an unreported decision of the Court of Appeals."

The Court then gives the history of the case of *Pitcher* v. *Carter*, 4 Sandf. 1, in which the same doctrine was maintained, and the case finally affirmed by the Court of Appeals, and concludes:

"It seems clear, therefore, upon principle and authority, that the court of chancery has power to order a sale of the equitable interests of the infant plaintiffs in question."

In *Anderson* v. *Mather*, 44 N. Y. 260, the doctrine of the foregoing case was affirmed, and the Court of Appeals declared that—

"The power exercised by the court of chancery as to the sale of the estate of infants of an equitable nature, is inherent, and not derived from statutory authority. * * * The authority to sell the estate of infants, of an equitable character, independently of any statutory power, has been exercised by the court of chancery in several instances in this State. * * * The exercise of the power in question has been long in use, has been advantageous, and ought now to be doubted."

Therefore, if Alfred Bent had any estate, legal or equitable, in this property, by reason of the decree of 1865 or otherwise, he made such a disposition of it by his will that the interest which his minor children took was only

equitable, and was either subject to disposal by the widow as trustee independently, or by the direction of the court of chancery under its general power over the trust estate of infants. If the authority was otherwise lacking in the District Court to direct the conveyance by Guadalupe Bent, such authority is supplied by the will, either to her alone or to the Court, or to both.

But if, *pro argumento*, we grant the proposition in its entirety, that the District Court had not the power to direct the conveyance, it will avail complainants nothing in this case. There still remains the other proposition already established by overwhelming authority, and which no Court has ever denied, that the Court had the power to set aside its own interlocutory decree. No Court would now annul the entire decree merely because one part of it was erroneous; the valid part would remain in any event. But every Court would presume that the District Court in 1866 vacated its former interlocutory decree in the exercise of its undoubted power, and for sufficient reasons; and such reasons are plainly apparent in the record. The whole proceeding touching the conveyance by the Bent heirs may be treated as surplusage, and as not affecting the rights of the parties, one way or the other. The Court might properly have dismissed the bill in the partition suit for want of equity, and reached the same practical result. Hence, even if the conveyance by Guadalupe was void, still the decree of June, 1865, is extinguished, and the original suit stands abandoned by all parties, though not formally terminated. It would therefore remain for the Court *now* to say, upon the original bill of 1859, and the sworn answers to it, whether it will not consider that bill as dismissed for want of title in the

Bents, and quiet the title accordingly. The ultimate object sought by the present bill is to re-establish the decree of 1865. Before this can be done, complainants are bound to show that the decree, upon the pleadings in the record, was a proper one. It is useless to invoke presumptions to help it, for these will equally attach to the decree by which it was extinguished. If it appears by the statements of their own original bill of 1859, that Charles Bent never had any title to an undivided interest in the grant, that is an end of the matter.

Upon the other allegations of the bill imputing error to the decree of 1866, little need be said.

The contention that the decree of 1866 was void because it failed to give the infants a day to show cause against it, or that they have a right to treat it as voidable for error upon their application on coming of age, is as little supported by authority as their contention that the interlocutory order of 1865 is a final decree.

These infants were *complainants* in the case, who were not brought in by any act of the defendants, but as the successors of their father, who had voluntarily gone into Court. The compromise was brought about by the procurement of the complainants, and not of Maxwell. It is settled on abundant authority that an infant complainant has no day in Court after decree to attack it, and is as much bound as a plaintiff of full age, unless for fraud such as would enable any other party to attack it.

1 Dan. Chy. (5th Ed.) 73.

Gregory v. *Molesworth*, 3 Atk. 626.

Brooks v. *Hertford*, 2 P. Wms. 578.

10 Am. & Eng. Encyl. 696, and cases cited.

This Court, in a recent case, has affirmed this rule,

upon the foregoing English authorities, which it quoted with approval, as follows:

"In *Gregory* v. *Molesworth*, 3 Atk. 626, Lord Hardwicke said that—

"'It is right to follow the rule of law, where it is held an infant is as much bound by a judgment in his own action as if of full age; and this is general unless gross laches, fraud, or collusion appear in the *prochein amy;* then the infant might open it by a new bill.' So in *Brooks* v. *Hertford*, 2 P. Wms.: 'An infant when plaintiff is as much bound and as little privileged as one of full age.'"

Kingsbury v. *Buckner*, 134 U. S. 650.

In the last edition of Freeman on Judgments, vol. 2, p. 513, the modern doctrine is stated to go much further, as follows:

"But the better opinion is that an infant defendant is as much bound by a decree in equity as a person of full age. Therefore, if an absolute decree be made against a defendant under age, he will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed it." Citing—

Ralston v. *Lahee*, 8 Iowa, 23.

Joyce v. *McAvoy*, 31 Calif. 273.

III.

The Transaction was Free From Fraud or Wrong of Any Kind.

As to the remaining ground of attack upon the decree of September, 1866, and the compromise settlement by Guadalupe Bent, viz.: fraud in their procurement, it is completely disposed of by the findings of fact by the lower Court. (Rec., pp. 75–76.) Charges of fraud are easily made, but too often amount to mere clamor, and are employed, as this Court said in *Marquez* v. *Frisbie*, 101 U. S. 478, simply to "stigmatize acts which are adverse to the plaintiff's view of his own right." So when this record is examined it will be found that the Bent case, like many others, is rich enough in allegation, but wholly barren in proof. True, they have proved that the Maxwell grant is a valuable property, and that Maxwell was a man of unusual force of character, and great influence among men—neither of which were ever disputed. They have also established the fact that Mrs. Bent was an "ignorant Mexican woman,"—ignorant enough to tell the truth about this transaction, and to show that as to all its substantial features she perfectly comprehended the nature of her act, and intended that it should have the effect which it is understood to have by everybody except Mr. Thompson and his learned counsel. They do *not* show that Maxwell made use of his power, wealth, or influence to obtain any advantage in the transaction or for any purpose, except to announce his intention of defending his title and possession so long as there was a Court to appeal to.

The finding of facts by the lower Court, upon this point, s as follows:

"It is proven on the part of the complainants that the said Guadalupe Bent is a Mexican woman, and at the time of her said appointment as guardian *ad litem* to the infant complainants, and at the time of the execution of her deed of May 3, 1866, was ignorant of the English language, unable to read, write, or speak the same; was unfamiliar with business or with her duties as guardian *ad litem*; was without knowledge of the boundaries or extent of said lands, or the character or value thereof, or of the Act of Congress confirming the said grant, or of the particulars of the decree of June 3, 1865; that Maxwell represented to Scheurich that the grant was not as large as it was supposed to be; that it did not extend into Colorado or beyond the Red River, whereas it did so extend over 200,000 acres; that said Scheurich and Guadalupe Bent believed and were influenced by said representations; that the said Maxwell, while generous and magnanimous in many respects, was unscrupulous and tyrannical as well, and was a resolute and determined man, and was at that time a man of large wealth and great power and influence throughout the county of Taos and Territory of New Mexico, as was known to said Guadalupe Bent, and he exercised such power and influence in such way that the weak feared to oppose him in matters of personal concern; that said Guadalupe Bent was in part influenced in executing said conveyance by this known character of Maxwell; that Maxwell made threats that unless the Bent heirs accepted the sum of $18,000 for their claims they would never get anything, and that no one should occupy any part of his land, and that such threats were communicated to said Guadalupe, and that this and Maxwell's known character influenced her in making the conveyance to Maxwell; that the said conveyance was written in the English language, and was not read over to the said Guadalupe or interpreted to her.

"But it appears to be the fact that means of knowledge of the extent, character, and value of the said grant was open to the Bent heirs and to their counsel. It was not definitely known at the time where there the boundary line between Colorado and New Mexico was. Guadalupe

Bent acted in concert with the adult complainants in the suit, dealing with their own interests on the same terms as those she represented, and she was willing to make the same settlement they did. Both Scheurich and the counsel for the Bent heirs were conversant with both the English and Spanish languages, and could read and write the same.

"It appears by Guadalupe Bent's own testimony, and the Court accordingly finds, that when she executed the conveyance to Maxwell she understood there had been a settlement with Maxwell by which the interests of the Bent heirs were to be transferred to Maxwell for the sum of $18,000; that she understood the document she signed was a transfer of the interest in the Maxwell grant which had belonged to her husband, Alfred Bent; that the settlement for $18,000 was satisfactory to her; that she supposed the document she signed was one which Scheurich had arranged with Maxwell; that she had relied on said Scheurich for advice, and was willing to accept and do whatever he thought best in the matter; that she believed she had authority to sign the deed and to convey the interest in the said grant which her former husband, Alfred Bent, had claimed or owned, and it was her intention by the said deed to convey to Maxwell whatever interest in said grant had belonged to said Alfred Bent in his lifetime and was left by him at his decease. *And the Court finds that no fraud, imposition, or error has been shown to have entered into said transaction or to have brought about said compromise decree.*" (Rec., pp. 75–76.)

The truth is, the record and proofs in this case show that if there ever was a disputed transaction that proved to be free from every element of imposition, concealment, misrepresentation, or fraud, this was such a transaction. It was a compromise of a more than doubtful litigation. It was conducted and concluded fairly, openly, and above board.

Maxwell held no fiduciary relation with these people. He was a defendant, denying absolutely their claim to any

interest whatever in the property. He was at arm's length with them, fighting for his rights and defending his title. He sought no compromise, but proposed to fight it out in the Courts, as he had a right to do. It was *their* proposition, not Maxwell's, that the litigation should be compromised by his paying them a money consideration for their claim; and this proposition was first made and urged, not by some one acting for these infants, but by their father in his lifetime, acting in his own right. Every act and declaration by Maxwell now complained of was perfectly legitimate for a party in his position.

The Bents were represented by able and experienced counsel. Their counsel, two out of three of them that we know of, advised the compromise. It was substantially agreed to by Alfred Bent in his lifetime, and finally agreed to by the adult complainants, including Guadalupe Bent, and accepted by the Court as advantageous to the minors. The Court had all the parties before it, was familiar with the circumstances of the whole case, and was better able to judge what was fair and right, and for the benefit of the minors under the conditions then existing, than this Court can possibly be. There is not the slightest intimation that the Court was imposed upon by misrepresentation of the facts, upon which it acted. Every presumption is in favor of the decree, and the decree itself is conclusive of every fact necessary to support it.

"It is an elementary rule that the judgment of a court of general jurisdiction need not state the facts or conclusions of fact upon which it is founded or authorized. This it is which primarily distinguishes it from the judgment of a court of inferior jurisdiction. That which is necessary to the judgment of such a court is presumed to have been shown to it, and found and determined by it."

Gager v. *Henry*, 5 Sawyer, 241, 242.

Grignon v. *Astor*, 2 How. 339, and cases cited.

The fact that there was a mutual agreement between the parties, settling and determining all the equities in the cause, upon which the decree was entered, is solemnly recited in the record thereof, and is a matter adjudicated by the Court in the case before it, and no person can now be heard to say, at this late day, that the fact was otherwise.

And besides this, the fact of the compromise agreement, in the exact terms upon which it was consummated, is also conclusively established by the findings in the present case.

Such compromises are favored by courts of equity.

1 Story Eq., sec. 131a.

2 Lead. Cas. Eq. (4th Am. Ed.) 1903.

In case of infants, if satisfied it is for their advantage.

Lippart v. *Holley*, 1 Beav. 423.

Brooke v. *Mostyn*, 33 Id. 457.

Monday v. *Monday*, 1 Vesey & B., 223.

In re Livingston, 34 N. Y. 578.

"The compromise of a doubtful title, when procured without such deceit as would vitiate any other contract, concludes the parties, though ignorant of the extent of their rights."

Gibson, C. J., in *Hoge* v. *Hoge*, 1 Watts (Pa.), 163.

"Compromise of a doubtful claim cannot be set aside but for fraudulent misrepresentation of facts, a fraudulent concealment of facts, or such imposition otherwise as amounts to unconscientious and unfair dealing."

Mills v. *Lee*, C. T. B. Mon. 91 (17 Am. Dec. 125).

"Compromises of disputed property are in all cases desirable, but especially of lands, on which the quiet, peace and subsistence of the citizens of a country so essentially depends, and it is the peculiar duty of courts of justice

to cherish and support them, when they are not intermingled with fraud."

Fisher v. *May*, 2 Bibb, 448.

"The right of the defendants to appeal from the decree, and the fact that they had declared their intention to do so, created such a dispute in regard to their liability as made it a proper subject for compromise. The compromise was made and fully performed on their part, they paid the money, which was received in payment for the decree, and took no appeal. It is not now open to the plaintiffs in error to treat this payment merely as a credit on account, and hold the defendants to their original liability."

Bofinger v. *Treyes*, 120 U. S. 198.

The Court will act for the benefit of an infant without regard to the prayer of the petition.

1 Dan. Ch. Pr. 73.

De Mandeville v. *De Mandeville*, 10 Vesey, 59.

Infants are bound by decrees taken by consent, though there be no reference to a Master.

1 Dan. Chy. 163, 164, 974 (5th Ed.).

Walsh v. *Walsh*, 116 Mass. 383.

Wall v. *Bushby*, Brown Ch. 484.

Such reference is discretionary.

Lippiat v. *Holley*, 1 Beav. 423.

A guardian *ad litem* may be appointed for infant plaintiffs, though not usually done.

1 Dan. Chy. 69 (5th Ed.).

After appointment of guardian *ad litem*, the relation of attorneys and solicitors to the case is precisely the same as in the case of adults.

Doe v. *Brown*, 8 Blackf. 443.

Infants are bound by the conduct of solicitors.

1 Dan. Chy. 74 (5th Ed.).
Walsh v. *Walsh*, 116 Mass. 382.
Tillotson v. *Hargrave*, 3 Madd. 494.
Levy v. *Levy*, 3 Id. 245.
1 Freeman on Judgments, sec. 151.
2 *Ibid.*, sec. 513.

Among other allegations of error the bill charges that the Court in 1866 entered the decree without any reference to a Master, or judicial inquiry as to whether the agreement for compromise had been made, or whether the decree would be for the benefit of the infants. (Rec., p. 10.) The negative thus asserted cannot be shown by the record of the cause. The mere fact that the files do not contain these proceedings, nor the decree itself recite them, does not tend in the slightest degree to prove that they did not exist. If they were proper and necessary, the decree itself raises the presumption that they were done.

"If the record is silent with respect to any fact which must have been established before the Court could have rightly acted, it will be presumed that such fact was properly brought to its knowledge."
Settlemier v. *Sullivan*, 97 U. S. 444.

It would require evidence of facts outside the record to establish the negative, and this again would be fatal to the bill as a bill of review, under the law as declared by this Court in 95 U. S., p. 397.

It is stated several times in the briefs of appellants that at the time of the proceedings in the District Court of Taos county in 1866 the complainants had no counsel,

and that the relation of attorney and client between them and the counsel of record in the case had ceased to exist.

There is nothing whatever in the record to warrant such an assertion as this. It is based on the statement in the findings (Rec., p. 77) that upon the delivery of the deeds by Guadalupe Bent and the adult complainants, May 3, 1866, Scheurich and his wife assumed for complainants payment of the fees of their counsel, and paid the same. It does not say that the counsel were discharged; and in the absence of a positive showing of a change of counsel by order of the Court it must be presumed that the same counsel continued so long as the case remained on the docket.

Authority to do an act, and other relations or conditions of persons or things, once shown to exist, are presumed to continue until the contrary is proven.

Lawson on Presumptive Evidence, p. 172.

19 *Am. & Eng. Enc. of Law*, p. 75.

Much stress is also laid upon the statement that the decree of 1866 was not entered by the *personal* procurement of Scheurich or Guadalupe Bent. If the decree purported to accomplish some scheme different from that which had been agreed to, this suggestion might be entitled to some consideration. But as it is in perfect conformity with the settlement already made, there is nothing remarkable in the fact that the clients did not *personally* procure or know of the preparation or entry of the decree. Such technical matters would naturally and properly be left to counsel.

The Price was Adequate.

Inadequacy of price, known to Maxwell and concealed from the Bents, is another iniquity charged in the bill, and freely dwelt upon.

Now, it is probable that Maxwell knew more about the grant and its value then than anyone else. Whatever value it had at that time had been created by the efforts of himself and Beaubien. (Beaubien's answer, Rec. p. 54.) He had settled there when others dared not go, and maintained himself against Indians, expended many thousands of dollars in the improvement and development of the property and perfecting its title, to which the Bents had never contributed a farthing's aid. But there cannot be said to be concealment where knowledge is open to all who choose to look and inquire. The counsel for the Bent heirs were not ignorant persons; the husbands of the adults, Teresina and Estefana, were men of intelligence and prominence in their community, and they accepted for their wives the same terms of compromise that Guadalupe did.

But the best evidence of all that the transaction was neither unfair nor fraudulent is to be found in the contemporary acts of the heirs of Charles Beaubien, one of the two original grantees, who left a half interest in the grant, undisputed except by this Bent suit. Leaving out the one-fourth claimed by the Bents, he left three-eighths interest in the grant which nobody disputed. He died in 1864, leaving six children—one son and five daughters, one of whom was the wife of Maxwell. They inherited his interest in the grant equally (Rec., pp. 59–60). The husbands of the other daughters were merchants and stock-raisers, were intelligent men, ranked among the best citizens in their community, and were considered men of

wealth and influence. They joined with their wives and Beaubien's son in conveying to Maxwell, from 1864 to 1870, their several undivided and undisputed one-sixteenth interests for $3,500 each (Rec., p. 68).

These facts, from the current transactions of that day, in the same property, by people who were as well qualified to take care of their own interests as any in New Mexico, furnish the highest proof that could be offered of the fairness of Maxwell's compromise with the Bent heirs.

They suggest a simple question in answer to all allegations of inadequacy of price: If several undisputed interests in this grant, of one-sixteenth each, were sold by men of wealth and influence, in the ordinary course of business, at about the same time—some shortly before and some shortly after—for an agreed price of $3,500 each, was not $6,000 a fair price for a disputed claim, involved in pending litigation, to one-twelfth?

The Decree was not against Infants.

The decree of 1866 is continually denounced by our opponents as a decree *against* the infants. There is no more reason for calling it a decree against them than a decree in their favor. It was the result of a settlement brought about at the solicitation of their father, mother, and adult co-complainants. It required Maxwell to pay for their doubtful claim more than he was paying for larger undisputed interests in the property. That this was a provision for their benefit, and in their favor, there cannot be the slightest doubt. And if necessary, it is perfectly competent for this Court to again declare upon this entire record—which brings before the Court everything in the original suit, everything that would have been be-

fore the appellate courts on Maxwell's appeal from the partition decree if the compromise had not been made, and everything that would be before appellate courts hereafter, if the litigation were now to be relegated to that situation by annulling the compromise decree—that the compromise decree was in the interest and for the advantage of the infant complainants.

The Price was Paid.

An effort is made to show that the price agreed upon was never paid by Maxwell to Guadalupe Bent or her children. His notes were accepted in payment for their conveyances by all the complainants in the suit, including, as well the adults, Teresina and Estefana and their husbands, as Guadalupe as guardian of her children. They amounted to $18,000, divided into such sums as were desired by the parties (Rec., p. 76). Guadalupe received one of these for something over $5,000. The reason why her note was for less than $6,000 is explained (Rec., p. 77): Scheurich and his wife assumed and paid the fees of counsel for complainants in the suit, and the amount so paid was included in the note of Maxwell given to Scheurich's wife, and the *pro rata* amount deducted in equal proportions from the other two notes given to Guadalupe Bent and Estefana Hicklin. The Court below finds (Rec., p. 76) that "Maxwell was at all times after the making of the note a man of ample financial responsibility." The mere fact that an unascertained amount remained unpaid on the note at the beginning of the Maxwell Company's suit in 1870—which the Court finds to be the weight of the evidence, upon testimony which it declares to be conflicting (Rec., p. 76)—would neither invalidate the deed of Guadalupe, or the decree authorizing it, nor tend to prove

that the Bents ever had a title for which anything should have been paid. It would establish nothing more than a still subsisting, collectible money demand against a solvent man for something.

The facts stated by the lower Court in its findings, we respectfully submit, establish that the note was paid.

The note is not in the possession of complainants, but had been delivered to Maxwell. This fact raises the presumption of payment.

Lawson on Presumptive Evidence, 346–349.

Upon this rule of evidence the author states as follows:

"This rule is founded on a reasonable principle, which is supported by numerous case sthat where bills of exchange, checks, orders for the payment of money or goods, promissory notes or other obligations are paid, they, as a general rule, go into the hands of the person paying them. It is to be presumed, as already said, that a man paying a written obligation will take it into his possession."

"'When,' said Lord Ellenborough to the jury in an old case, 'there is a competition of evidence upon the question whether a security has or has not been satisfied by payment, the possession of the cancelled security ought to turn the scale in his favor, since in the ordinary course of dealing the security is given up to the party who pays it.' It has been held that where the defense of payment of a note or other security is made, and the evidence on both sides is evenly balanced, the possession by the plaintiff of the uncancelled paper will turn the scale in his favor."

This presumption is no doubt rebuttable, but only by evidence so strong and positive as to carry conviction. But what explanation is given here? None whatever, except a statement of Mr. Thompson, which is so palpably unreasonable and incredible, that no Court should give it

the slightest consideration. He says that he sent it to Maxwell "to have a credit indorsed, and that he never got it back." The holder of a note is often called upon to indorse a partial payment upon the note for the protection of the maker. But that he should send it to the maker for that purpose, instead of indorsing the payment himself, or having it done by Guadalupe Bent, is out of all reason. It does not appear that any effort was made to recover the note, but the fact is expressly stated that Maxwell did not refuse to return it. Maxwell died in 1875 and we cannot have his story. But he lived a solvent man up to the commencement of the Maxwell Company's suit in 1870. And so we are asked to believe that this note, the paper of a man at all times of ample financial responsibility, was simply abandoned by the parties owning it for at least three years after it became due, and no effort ever made afterwards to collect it. Common sense, and the presumption of law as well, would declare upon these facts alone that the note was paid. But when to this is added the further fact that the payee of the note, Guadalupe Thompson herself, swears that it was paid, it seems to us that there cannot remain the slightest doubt about it.

Besides all this it appears from the record of the proceedings of the Probate Court of Taos county that by the will of Alfred Bent, Guadalupe Bent was named as executrix, qualified as such under the title of "Administratrix," made and filed in the Probate Court an inventory, in which the note of Maxwell was duly listed, and continued to exercise her functions as such as late as October 25, 1867, when she approved a claim of Horatio Long against the estate for $1,790, which was allowed by the Court. (Rec., pp. 63–68.) Being thus within the jurisdiction of the Probate Court, and it being conceded that Maxwell

NOTE.—When the proofs were taken under the bill of 1870, Maxwell could not testify on account of interest:
Pino v. *Beckwith*, 1 N. M. 19, 27.
Ward v. *Broadwell*, *ibid.* 75, 90.

Before proofs were taken after the case was remanded, and before the evidence act of 1880 was passed allowing interested parties to testify, Maxwell was dead.

was at all times financially responsible, the presumption arises—irrespective of any conflicting testimony of witnesses—that Guadalupe Bent did her duty as administratrix, by collecting the note and making a proper application of the proceeds, under the direction and with the approval of the Court.

But, at all events, the Maxwell Land Grant and Railway Company, purchasing this property four years afterwards for a valuable consideration (Rec., p. 12; and, in No. 90, pp. 66, 77, and 20), cannot be chargeable with notice of the non-payment of the money, nor can its title be affected by the fact, whatever it may be. It found on record in April, 1870, the deed of Guadalupe Bent, reciting and acknowledging payment for some claim to the property for which there was no record title, and of which the only evidence was to be found in the proceedings in a suit which was finally disposed of, and no longer on the docket. It had a right to rely upon this record evidence of the extinguishment of the claim. No court of equity would ever disturb a title acquired under such circumstances, upon an allegation that some unknown portion of the consideration for the deed was unpaid, much less will a court of equity do it with the facts in this record before it, showing that by all the rules of human conduct, it *must* have been paid.

Not only so: If this were a controversy between Maxwell and the Bent heirs, it might be said that Maxwell, having agreed to a compromise with them, must stand to its terms in every particular. But the Maxwell Land Grant and Railway Company, as a subsequent purchaser for value, is entitled, if necessary, upon this, as well as other questions in the case, to look back of the matter of payment, and see whether the Bents ever had any title for which anything ought to have been paid.

The statement is made in this bill, and was dwelt on with frequent repetition in the argument of opposing counsel below, that there was no necessity for the sale of any real estate for the maintenance of the children of Alfred Bent.

As we have before shown, this was not in any sense a proceeding for the sale of the infant's real estate, and is not to be tested or judged by any of the rules applicable to such proceedings. But even on this point we are not without facts in the record which show that such necessity did exist. The best evidence on this subject is that furnished by the probate record of the estate. (Rec., pp. 65–68.)

The inventory of the property left by Alfred Bent, and filed by Guadalupe Bent as executrix, shows that outside of the real estate and the $5,000 note received from Maxwell upon the compromise, the assets of the estate amounted to only $1,408, while the liabilities were as follows:

Debts mentioned in will	$569	
	60	
	4	
		$633
Claim of Horatio Long, admitted by administratrix and verified by the affidavit of Geo. W. Thompson		1,790
Total		$2,423

Thus leaving a balance of indebtedness of $1,015 in excess of the entire personal property of the estate.

This proof, from the records of the probate court, effectually disposes of the claim that there was no necessity for disposing of any interest in lands for the maintenance of the children.

Remembering the prices at which the Beaubiens sold their interests in the grant, what would the Bent estate have probably received for its claim against Maxwell if, instead of being compromised, it had been sold under decree of Court at the suit of creditors to make up the deficiency in personal property and pay the debts of the estate?

IV.

If the Decree of 1866 were Erroneous Complainants would still be without any Canse of Action.

It is assumed by our learned opponents throughout this controversy that the only thing between them and a twelfth part of this estate, so rich in adjectives at least, is the decree of 1866, and that if it is annulled an absolute estate will *ipso facto* vest in their clients, and nothing will be left to do but to parcel out the property.

Let us consider what would have been the practical result if the District Court had adopted their views, and vacated the decree of 1866. The interlocutory decree of 1865 would have been restored to the record and the case would have stood where it had been immediately after its entry. Upon the application for an order to appoint new commissioners for partition, defendants would ask a rehearing upon the interlocutory decree. Either then, or upon final hearing, after new commissioners had been appointed and had reported, the Court would have to pass upon the question, whether on the law or the facts the Bents ever had any title to an interest in the grant. In the unsupposable event that the Court should hold that complainants had established title, and the right to partition, defendants would appeal from the final decree to the Court of last resort.

Whatever may be the impression of the Court upon the other questions discussed, there is no escaping the proposition that at sometime, either now or hereafter, when our successors shall argue and sit in judgment, the grantees of Maxwell are entitled to the judgment of the Court of last resort upon the question whether in their original suit the Bents showed title to any interest in this property upon which a partition could be had. Therefore, why should not the Court, with all the facts before it which could ever be ascertained, pass upon this question first of all?

Our opponents said to the District Court, as they now say to this Court, that the interlocutory decree of 1865 is sacred and inviolable. Right or wrong, it must be taken, not simply for what it purports to be, but for what they claim it to be, and all the costly machinery of a court of equity must be put in operation to carry it into execution, regardless of the fact that it is certain to be ultimately reversed by the appellate court and the bill dismissed. They are here asking equity to obtain affirmative relief by disturbing an existing and settled status of property. And yet they insist that the Court shall plunge ahead—blindly, illogically and unreasonably—to do that which it may know to be inequitable and unjust, and which will only lead to ultimate reversal and defeat.

And this, also, regardless of the rights of subsequent purchasers for value, who acquired their title four years later, and after the lapse of the period within which an appeal could have been taken from the decree of 1866.

But such are not the methods of equity. If there were nothing else in this case, the Court must necessarily, before setting in motion this new train of litigation, consider as an inquiry precedent to all others, the propriety of the interlocutory decree of June, 1865, which it is now asked

to re-establish and carry into execution. Such an inquiry is in no sense a "collateral attack," as our learned opponents throughout their brief assume. The decree is already dead, and the effort is to revive it. It has been vacated and blotted out of existence by the Court which made it. It is a nonentity. In order to resurrect it the Court is now asked to act affirmatively, and restore this decree by annulling another.

Such relief is not a matter of right, to be had by anyone for the asking. It calls into action the highest power of a Court of equity, one which is never exercised unless the court is satisfied, upon consideration of all the facts before it, that there is a substantial reason for it, founded upon the ultimate justice of the case. The Court is not bound to act at all. It may act or it may remain passive; and it will do the one or the other according to its own notions of what is reasonable and proper, with regard not only to the rights and interests of the parties, and of subsequent purchasers, but also to the interest of the public as well, which is that there be an end of suits, and that titles and business be not disturbed by fruitless and unfounded litigation. Courts will not do a vain and useless thing, and before any Court will undertake to disinter the skeleton of this decree, and breathe into it the breath of life, it will first inquire if there ever was any reason for its existence, or a probability of its arriving at maturity, and upon finding that there was neither, will leave it at rest forever.

Respectfully submitted,

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